United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

IN THE

United States Court of Appeals

521

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,051

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*, PRESTO MANUFACTURING COMPANY, *Intervenor*.

No. 22,313

PRESTO MANUFACTURING COMPANY, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

On Petition to Review an Order of The National Labor Relations Board

BRIEF FOR PETITIONER IN NO. 22,051

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STATEMENT OF ISSUE PRESENTED FOR REVIEW

The issue presented in Case No. 22,051 is whether the Board's Order is reasonable and proper.

(The pending case has not previously been before this Court under the same or any other title.)

STATEMENT OF THE CASE

A. *Nature of the Case*

Case No. 22,051 is before the Court on the Petition of the International Brotherhood of Electrical Workers, AFL-CIO (hereinafter, "IBEW") to review an order of the

National Labor Relations Board (hereinafter called "the Board"). Case No. 22,313 is before the Court on the Petition of Presto Manufacturing Company (hereinafter, "Presto") to review the same order of the Board. The Board has filed a cross-application for enforcement of the Board's order and a motion to consolidate both cases for all purposes, which motion was granted on October 29, 1968. This Court has jurisdiction under Section 10 (f) of the National Labor Relations Act, as amended, 29 U. S. C. § 160(f) (hereinafter, the "Act"). The Decision and Order of the Board is officially reported at 172 NLRB No. 30.

B. *Proceedings Below.*

1. *The Representation Case, Case No. 15-RC-3670.*

On May 19, 1967, the IBEW filed a petition for a Board election in a unit of production and maintenance employees, including the shipping and receiving departments, at Presto's Jackson, Mississippi plant. Pursuant to a notice issued by the Regional Director for the Board's Fifteenth Region on May 31, 1967, a representation hearing was held on June 13 of that year. On June 30, 1967, the Regional Director issued his Decision and Direction of Election, and an election was subsequently held on August 11, 1967, in which the IBEW received 334 votes, 245 voted against representation, and there were 29 challenged ballots.

On August 18, 1967, Presto filed objections to the conduct of the election, which objections were overruled in their entirety by the Regional Director in his Supplemental Decision and Certification of Representative (the IBEW), dated November 9, 1967.

On November 26, 1967, Presto filed with the Board in Washington a request for review of the Regional Director's Supplemental Decision and Certification of Representative. On January 2, 1968, the Board denied the request for review by telegraphic order. Presto's motion for reconsideration of the denial of its request, dated January 5, 1968, was denied by the Board's telegraphic order of January 23, 1968.

2. *The Unfair Labor Practice Proceeding, Case No. 15-CA-3211.*

Following the November 9, 1967 Certification of the IBEW as the exclusive bargaining representative of certain of Presto's employees, *supra,* the IBEW made several requests of Presto to bargain collectively over the terms and conditions of employment for the employees in the unit found appropriate, which requests were refused by Presto. On November 22, 1967, the charge giving rise to the proceeding below was filed by the IBEW, alleging that Presto had refused to bargain collectively, in violation of Section 8(a)(5) of the Act. A complaint and notice of hearing subsequently issued on January 29, 1968, which was amended on February 15, 1968.

Following Presto's answers to the original and amended complaints, the General Counsel moved for summary judgment on March 1, 1968. A show cause order on the General Counsel's motion for summary judgment was issued on March 5, 1968, and, following responses to same by the IBEW and Presto, Trial Examiner Marion C. Ladwig issued a decision on March 27, 1968 which granted the General Counsel's motion for summary judgment and found that Presto had, since November 16, 1967, refused to bargain collectively with the IBEW in violation of Section 8(a)(5) of the Act. After a Board remand of the proceeding, Trial Examiner Ladwig issued an amended decision on April 3, 1968. The Trial Examiner's recommended order included provisions requiring only that Presto cease and desist from refusing to bargain with the IBEW as the exclusive bargaining representative of its employees in the appropriate unit specified therein and in any like or related manner interferring with, restraining or coercing employees in the exercise of their rights under Section 7 of the Act, and requiring it to bargain with the IBEW upon request to do so and to post designated notices at its plant in Jackson, Mississippi.

Both Presto and the IBEW filed exceptions to the Trial Examiner's amended decision, those filed by the IBEW being limited to the nature of the remedial relief granted

by the Trial Examiner. Specifically, the IBEW requested the Board to order Presto to take certain remedial action in addition to that recommended by the Trial Examiner, as follows:

> (1) Mail to each employee a copy of the notice attached as an appendix to the Trial Examiner's decision.
>
> (2) For a period of six months, grant the Charging Party and its representatives reasonable access to bulletin board and other places within Respondent's plant where notices to employees are customarily posted.
>
> (3) Upon the Charging Party's request, make available within one month, at a mutually agreeable time, suitable facilities for a one hour meeting with employees on company time.
>
> (4) Permit employees to have access to representatives of the Charging Party on the plant parking lot, during non-working time, prior to and during collective bargaining negotiations for a contract.
>
> (5) Make its employees whole for wages and fringe benefits which they have lost as a result of Respondent's unlawful refusal to bargain with the Charging Party since its certification.

On June 24, 1968, the Board issued its Decision and Order adopting the findings, conclusions and recommended order of the Trial Examiner. In footnote 1 thereof, the IBEW's request for remedial provisions in addition to those recommended by the Trial Examiner was denied:

> "In its exceptions the Charging Party requests that certain further remedial provisions be added to those recommended by the Trial Examiner. As we do not find that such additional provisions are required or appropriate at this time to remedy the unfair labor practices found in this proceeding, the Charging Party's request is hereby denied."

In the proceeding before this Court, Petitioner IBEW seeks review of that portion of the Board's Decision and Order denying the additional remedial relief it requested before the Board.

C. *Background.*

The above chronology outlines the principal events in both the unfair labor practice case here under review and the underlying representation proceeding which began with the filing of the IBEW's petition on May 19, 1967. But the events actually giving rise to the present proceeding go back to March 18, 1966, when the IBEW filed an election petition in Case No. 15-RC-3344. An election was conducted in that case on May 26, 1966 in which 330 votes were cast for the IBEW, 7 for an intervening union and 340 against either union. Timely objections were filed by the IBEW, and unfair labor practice charges were subsequently filed against Presto on August 22 and 23 and October 18, 1966 in Cases Nos. 15-CA-2902, 2902-2 and 2902-3. The Board's Regional Director issued a complaint on the charges on December 16, 1966 and thereafter consolidated both cases with certain objections to the conduct of the Board's election of May 26, 1966 in Case No. 15-RC-3344.

A hearing on the consolidated cases was held before Trial Examiner Lloyd Buchanan on March 29-31, 1967. On April 4, 1967, the IBEW filed with the Regional Director a request to withdraw its objections to the election in Case No. 15-RC-3344, on the grounds that a second election for the employees could be held sooner through the filing of a new petition than through the continued processing of its objections in the pending representation case. On April 5, 1967, the Regional Director filed a motion seeking to have the representation case severed from the complaint cases and remanded to the Region for action on the IBEW's request to withdraw its objections. The motion was denied by the Trial Examiner, and there followed a series of procedural moves by all parties, resulting in an order by the Board, on May 18, 1967, reversing the Trial Examiner and remanding the representation case to the Regional Director for appropriate action. On May 19, 1967, the Regional Director approved the IBEW's request to withdraw its objections, and issued a Certification of Results of Election in Case No. 15-RC-3344. On that same date, the IBEW filed its petition in Case No. 15-RC-3670.

On May 31, 1967, Trial Examiner Buchanan issued his decision in the consolidated cases referred to above. Although he dismissed most of the allegations of the complaint issued by the Regional Director, he found that Presto had violated Section 8(a)(1) of the Act through foreman Smith's threats to a group of employees and his unlawful interrogation of one of them. In its subsequent Decision and Order of January 2, 1968, 168 NLRB No. 144, the Board adopted the findings, conclusions and recommendations of the Trial Examiner, but found an additional violation of Section 8(a)(1) of the Act in supervisor Washington's interrogation of employee Chambers.

As the Employer's entire course of conduct since the filing of the initial petition on March 18, 1966, including its unlawful activity found by the Board, is relevant to the issues raised by the IBEW's petition for review in Case No. 22,051, the Court is respectfully requested to take judicial notice of the Board's Decision and Order reported at 168 NLRB No. 144, 67 LRRM 1173.

SUMMARY OF ARGUMENT

In order fully to effectuate the policies of the Act, a remedy must have as its purpose the "restoration of the status quo to the greatest extent practicable" which must be measured by its ability "to redress the injury done to employees." *Local 57, International Ladies Garment Workers Union, AFL-CIO* v. *NLRB*, 126 U.S. App. D.C. 81, 86, 374 F. 2d 295, 300 (D.C. Cir. 1967). Because of Presto's unlawful refusal to bargain, the right of its employees to bargain collectively and to gain the fruits of such bargaining will be delayed for a period of at least some 1½-2 years. The effects of this delay are twofold: the weakening of their bargaining strength and of the position of their bargaining representative, and a direct loss of financial benefits which could have been achieved through collective bargaining.

The Board's standard "cease and desist" and "bargain upon request" order will not be adequate to dissipate these

effects and redress the injury to the employees. The means of access requested of the Board are necessary to have a sufficient impact on employees in order to restore the situation that would have existed in November 1967 but for Presto's unlawful refusal to bargain. The Board, in some instances, has granted such relief. *H. W. Elson Bottling Company,* 155 NLRB 714, enforced as modified 379 F. 2d 223 (6th Cir. 1967); *Scotts, Inc.,* 159 NLRB 1795, enforced as modified *sub nom. IUE* v. *NLRB,* 127 U.S. App. D.C. 303, 383 F. 2d 230 (D.C. Cir. 1967).

Finally, a financial reimbursement remedy is both appropriate and necessary, *Phelps Dodge Corp.* v. *NLRB,* 313 U.S. 177 (1951); *Fibreboard Paper Products Corp.* v. *NLRB,* 379 U.S. 203 (1964). It should be imposed herein in order to make the employees whole for the loss occasioned by Presto's refusal to bargain and to deny to Presto the opportunity to profit from its unlawful action. The propriety of such an order is an issue specifically left open by this Court in *UAW* v. *NLRB,* ..... U.S. App. D.C. ....., 392 F. 2d 801, 810 (1967).

ARGUMENT

THE ADDITIONAL RELIEF REQUESTED IS NECESSARY IN ORDER FULLY TO EFFECTUATE THE POLICIES OF THE ACT

In pertinent part, Section 10(c) of the Act states that:

> "If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, *and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. . . .*" (Emphasis supplied.)

In order to "effectuate the policies of this Act," a Board order must, in the words of this Court, cause the "restoration of the status quo to the greatest extent practicable;

however the basic purpose of restoring the status quo is to redress the injury done to employees [citations omitted]." *Local 57, International Ladies Garment Workers Union, AFL-CIO* v. *NLRB,* 126 U.S. App. D.C. 81, 86, 374 F. 2d 295, 300 (D.C. Cir. 1967), cert. den. 387 U.S. 942 (1967). It is respectfully submitted that, in terms of the effect on Presto's employees, it is impossible to restore the *status quo ante* without the additional relief requested by the IBEW.

It will be observed from the list of remedial relief sought by the IBEW before the Board, p. 4 *supra,* that these items fall into two broad categories. Items 1-4 request a grant of additional access to employees through various means, and item 5 seeks reimbursement of the employees for wages and fringe benefits lost because of Presto's unlawful refusal to bargain since the certification of the IBEW on November 9, 1967. The need for the additional remedial relief can best be seen by re-examining the sequence of events in the related proceedings involving the IBEW and Presto and by noting the length of time during which Presto's employees have been deprived of their statutory right to bargain collectively through a representative of their own choosing.

At the writing of this brief, just over one year has elapsed since the certification of the IBEW. By the time all briefs are filed and argument heard, a decision cannot reasonably be expected for at least another 4-5 months, or almost a year and a half following certification, and a year and three quarters since the Board election in which the employees made their choice of a bargaining representative. It may be recalled in this regard that the election in Case No. 15-RC-3344 was actually conducted on May 26, 1966, almost two and a half years ago, and that the IBEW's objections in that case were withdrawn and a new petition filed so that a final decision concerning the employees' choice of a bargaining representative could be *expedited.*

When, pursuant to Court order, Presto finally comes to the bargaining table, the adverse effects of this protracted

delay upon the employees will be twofold: first, as noted above, they will have lost the financial benefits which would have accrued to them earlier if Presto had bargained in good faith immediately following certification of the IBEW in November of 1967; and, second, the strength and ability of their designated bargaining representative to bargain effectively will have been severely weakened, along with the faith of the employees in the bargaining processes guaranteed by the Act. These effects are not abstract or imaginary. Rather, they are based on observations drawn after an extensive study of Board practice in refusal-to-bargain cases. Professor Philip Ross of the University of Pittsburgh's Graduate School of Business conducted a study of such cases over a five-year period. The text of Chapter 1 of his study, "Analysis of Administrative Process under Taft-Hartley," was published by the Bureau of National Affairs in its Labor Relations Reporter of October 17, 1966, 63 Lab. Rel. Rep. 132. One of Professor Ross' major findings was that:

> "5. The collective bargaining consequences of a remedied violation depended mainly upon the nature and extent of an employer's original resistance to bargaining and his persistence in delaying compliance. *Litigated cases frequently differed from non-litigated cases in fundamental ways and employers who litigated charges often succeeded in ousting their unions.*" 63 Lab. Rel. Rep. at 133. (Emphasis supplied.)

Later in his study, Professor Ross elaborated on this finding as follows:

> "By far, the most significant influence on bargaining consequences was the stage of case disposition. The facts speak for themselves. About two-thirds of cases closed before issuance of complaints resulted in execution of first contracts. This is substantially higher than the results in all the other stages. Even the informal cases which were closed after issuance of complaint did not quite reach this level of contracts achieved.
>
> "With the exception of the handful of cases which required Supreme Court action prior to closing, *the longer the litigation the less likely was the prospect of*

the signing of a first contract. Only about half of all cases closed after a Board order resulted in such contracts and *less than 36% of the cases closed after circuit court enforcement ended up with agreements.*

"The explanation for these results which comes most readily to mind is the factor of time. The long, drawn out process of administrative investigation, hearing and findings and, ultimately adjudication, bring two, three and four years of delay and a weakening of the charging union through the effects of the unexpunged unfair labor practices upon the employees. Even events unrelated to the unfair labor practices, such as changes in the number and composition of employees, work to the same end.

"That justice delayed may end up in justice denied appears to be confirmed by this relationship of stage of cases closing with bargaining consequences. But this is not all of it. *A major finding of this study is that there are fundamental differences between employers who informally adjust their violations of the duty to bargain and those employers who exhaust every legal recourse prior to compliance.*

"These differences concern the nature and extent of the unlawful activities engaged in by the employer. On an average, a litigated case involved more separate violations of the duty to bargain and these were accompanied by far more extensive other unfair labor practices than were adjusted cases. *For example, only about 35% of the employers who informally settled their 8(a)(5) violations committed other unfair labor practices. Where court enforcement was necessary, about 69% of the employers had engaged in other violations.*" 63 Lab. Rel. Rep. at 136. (Emphasis supplied.)

It is in the context of the experience related by Professor Ross that the effects of Presto's lengthy course of resistance to collective bargaining on its employees, as well as the adequacy of the Board's standard remedial order, must be judged. And, viewed in that context, it is respectfully submitted that, if the policies of the Act are ultimately to be effectuated through meaningful bargaining with Presto, something more than the Board's "boilerplate" remedies is necessary. As Dean Bok has noted,

> "Aside from encouraging needless litigation, inadequate remedies also work an injustice on the parties involved. Employees may be compelled to forgo collective bargaining for months, and even years, while litigation drags on over violations that should never have occurred."[1]

Congress, of course, enacted Section 8(a)(5) for a specific purpose, and one that is fundamental to the policies of the Act. Remedies for violations of that Section must be effective, for "we refuse to believe that Congress was bent on the elaborate futility of a *brutem fulmen.*"[2] Moreover, since "remedies are the life of rights,"[3] they must meet the needs of given cases in order to be effective.

The standard Board remedies in most 8(a)(5) cases amount to nothing more, however, than a slap of the Employer's wrist. As the Sixth Circuit has stated,

> "A mere cease and desist order . . . may serve only to represent formal acknowledgment of the law while the offender maintains full possession of the fruits of its violation."[4]

The remedies requested by the IBEW and denied by the Board are essential if, in fact, Presto's refusal to bargain is to be *effectively* remedied. Thus, with respect to the requests for additional access to employees, it is not unnatural that, after the passage of almost two years following their choice of a bargaining representative, with nothing to show for it other than continuing reminders of the futility of choosing a union, the employees will question whether their representative can actually deliver for them through the process of collective bargaining. It is necessary, therefore, to grant additional means of access to the employees in order to dissipate these effects. In view of Professor

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[1] Bok, The Regulation of Campaign Tactics in Representation Elections under the National Labor Relations Act, 78 Harvard Law Review 38, 124 (1964).

[2] *People of Puerto Rico* v. *Hermanas, Inc.*, 309 U.S. 543, 548.

[3] *Campbell* v. *Holt*, 115 U.S. 620, 631.

[4] *Montgomery Ward & Company* v. *NLRB*, 330 F. 2d 889, 894 (1965).

Ross' study, it seems doubtful that the customary posting of notices at the plant can assure a complete return to the situation which would have existed in 1967 had Presto not then refused to bargain in good faith. Through the means suggested, and particularly through presentations by union spokesmen on Company premises, a far more substantial impact can be made on employees for the purpose of restoring their belief in the statutory process of collective bargaining and thereby strengthening the position of their chosen representative. (See further in this regard page 13 *infra.*)

In certain circumstances, the Board itself has recognized the need for remedial relief beyond its standard "cease and desist" and "bargain upon request" orders. Thus, in *H. W. Elson Bottling Company,* 155 NLRB 714, the Board agreed with the charging party there that more than the usual posting of notices was required:

> "The Board has a particular duty under Section 10(c) to tailor its remedies to the unfair labor practices which have occurred and thereby effectuate the policies of the Art. Thus, 'depend[ing] upon the circumstances of each case,' the Board must 'take measures designed to recreate the conditions and relationships that would have been had there been no unfair labor practice.'" (Footnotes omitted.) [5]

The additional relief granted by the Board included the requirement that the company there mail a copy of the Board's notice to each of its employees, grant to the union reasonable access to its bulletin boards and other places where notices to employees were customarily posted, for a three-month period, and permit the union to address the employees while assembled on company time and premises.

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[5] 155 NLRB at 715. The Board also noted in this regard, that "This process requires constant reevaluation of the Board's remedial arsenal so that the 'enlightenment gained from experience' can be applied to the 'actualities of industrial relations,' citing *NLRB* v. *Seven Up Bottling Company of Miami, Inc.*, 344 U.S. 344, 346; *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 236."

In support of the last requirement, the Board noted as follows:

> "The unique effectiveness of speeches addressed to employees assembled during working hours at the locus of their employment has received congressional and judicial recognition and has been substantiated by research studies. Staff of Subcomm. on National Labor Relations Board, House Comm. on Education and Labor, 87th Cong., 1st sess., Administration of the Labor-Management Relations Act by the NLRB 58 (Comm. Print 1961); *N.L.R.B.* v. *United Aircraft Corp. and Whitney Aircraft Div.*, 324 F. 2d 128, 130 (C.A. 2), cert. denied 376 U.S. 951; Note, 61 Yale L. J. 1066, 1074-1076, footnotes 33-39 (1952); Note, 14 U. Chi. L. Rev. 104, 108-110 (1946)."

On the Board's petition for enforcement, the Sixth Circuit approved the first two remedial provisions and modified the third to apply only in the event that the company subsequently addressed its employees with respect to union representation during the six-month period following entry of the court's order. *NLRB* v. *Elson Bottling Company*, 379 F. 2d 223 (1967).

In *Scott's Inc.*, 159 NLRB 1795, another of the so-called "serious misconduct" cases, the Board imposed the three elements of the *Elson* remedial formula and added the requirement that the employer read the Board's notice to employees during working time. 159 NLRB at 1807-1808. On review, this Court unanimously approved the *Elson* ingredients but, by a two-to-one vote, rejected the additional requirement of the reading of the notice by the employer. *IUE* v. *NLRB*, 127 U.S. App. D.C. 303, 383 F. 2d 230 (1967).[6]

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[6] For other instances of Board orders granting similar additional relief, see the following: *Marlene Industries Corp.*, 166 NLRB No. 58; *Sterling Aluminum Company*, 163 NLRB No. 40; The *J. P. Stevens* family of cases, 157 NLRB 869, enforced as modified 380 F. 2d 292 (2d Cir. 1967), 163 NLRB No. 24, enforced as modified 388 F. 2d 896 (2d Cir. 1967); 167 NLRB Nos. 37 and 38; 171 NLRB No. 163.

The Board may argue that the additional remedies requested are not appropriate here, as this is merely a "technical" 8(a)(5) case and that the *Elson* type remedies should be reserved for the "flagrant" or "serious misconduct" cases in which there is excessive evidence of union animus. There is no merit to that contention. First, as noted above, in any discussion of remedial relief as a means of restoring the *status quo ante,* the principal objective is the removal of the effects of the employer's unfair labor practices on his employees, regardless of the motivation therefor. It is the employees of Presto who have been injured because of the refusal of Presto to bargain for a period of 1-2 years. Only if the Board were empowered to punish employers would the latter's motivation have relevance to the type of relief afforded. Since this is not the case, however, we must look to the actual effect on the employees. And, so viewed, the relief sought is both necessary and proper. This very point has received the attention of this Court in the *Garment Workers* case, *supra* at pp. 7-8. Subsequent to setting forth the general principles governing remedial relief, quoted above, the Court compared the several cases in which the Courts of Appeals had dealt with remedies in "runaway plant" situations. In pertinent part, it observed that,

> "If the Board is suggesting that this remedy is suitable because the company has been hostile, it is making out a case that the order is not remedial but punitive. This is not a valid basis for an order. The Board's attempted distinction also overlooks the fact that employer anamosity toward the union was present in *Rapid Bindery,* although the Court concluded that the record did not support the Board's finding that this was the preponderant motive for the move. Finally, there was no hostility to the union in *Lewis, supra,* where the Ninth Circuit affirmed the remedy. Employer motivation or attitudes toward the union hardly seems to be the touchstone of judicial response." 126 U.S. App. D.C. at 89, 374 F. 2d at 303.

In any event, considering the entire background and course of events in this case, this cannot be considered as

merely a "technical" violation. It has been shown above that, in the course of the IBEW's first election campaign in 1966, Presto was found to have committed several independent violations of Section 8(a)(1) in the Board decision reported at 168 NLRB No. 144 67 LRRM 1173. Moreover, since at least some of these occurred prior to the holding of the election, the violations found by the Board probably would have resulted in the setting aside of that election had not the IBEW withdrawn its objections thereto for the reasons stated above. Thus, while we do not contend that this case stands on a par with *J. P. Stevens, Elson* or the other "massive violation" cases, the record in these related proceedings reveals that Presto is somethng other than the upright employer forced reluctantly and in complete good faith to resort to litigation in order to test the validity of a Board certification. Therefore, judged on either basis, this case is an appropriate one for the granting of the additional relief requested.

As for the financial remedy requested in item no. 5, it is elementary, of course, that,

> "Making the workers whole for the losses they have suffered on account of an unfair labor practice is part of the public policy which the Board enforces." *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 197 (1941).

It cannot be gainsaid that, but for Presto's refusal to bargain, negotiations would have been entered into long ago, or that the employees would for a longer period of time have enjoyed the benefits of increased wages and other working conditions bargained for them through their collective bargaining representative. They are, therefore, entitled to be made whole for the loss caused by Presto's unlawful acts. As for the Board's authority to grant a financial disbursement remedy in a refusal-to-bargain case, that matter has been put to rest by the Supreme Court in *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203 (1964).

The issue here presented was left open by this Court in *UAW* v. *NLRB*, ... U.S. App. D.C. ....., 392 F. 2d 801, 810 (1967), cert. den. ..... U.S. ....., 20 L. Ed. 2d 1364

(June 10, 1968). This Court found it unnecessary to pass on the Board's denial of the union's request for compensatory relief during the period in which the company unlawfully refused to bargain, or its refusal to explicate its grounds for the denial, since the Board itself petitioned the Court to remand that portion of its order for re-evaluation. That was one year ago. Some four months prior to that decision, the Board heard oral argument is a series of cases on the overall question of the appropriateness of compensatory relief in refusal-to-bargain cases. Yet, there is still no decision from the Board and no appearance of one to come. Unless the Board similarly petitions the Court in this case, the issue will now be squarely before the Court. And, even if the Board again requests a remand, the question that arises is whether the Board should be permitted to delay indefinitely its consideration and ruling on this important question. However difficult this issue may be, this Court has itself remarked that:

> "In the evolution of the law of remedies some things are bound to happen for the 'first time' . . . . We cannot regard changes in remedial mechanisms as beyond the Board's powers so long as they reasonably effectuate the congressional policies underlying the statutory scheme."[7]

Since the right of employees to select their representatives for the purposes of collective bargaining lies at the very heart of our national labor policy, it is essential to deter conduct which subverts that policy. In fashioning remedies to deter such conduct, therefore, it is necessary to consider, *inter alia*, the benefits which wrongdoers hope to gain—and often do gain—through their misconduct. The benefit sought by employers in refusing to bargain with unions is the time gained by such delay—perhaps as much as two years in this case—with the frequent result of retaining the freedom from collective bargaining which they have opposed from the beginning.[8] Therefore, in addition

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[7] *International Brotherhood of Operative Potters* v. *NLRB*, 116 U.S. App. D.C. 35, 39, 320 F. 2d 757, 761 (1963).

[8] See the Ross study, *supra* at pp. 9-10.

to the need to make employees whole as a means of restoring the *status quo ante,* compensatory relief is essential in order to take the profit out of violations of Section 8(a)(5). The alternative is, for all practical purposes, the granting of an economic incentive to those who break the law. For these reasons, it is respectfully submitted that the Court should at this time pass on the continuing failure of the Board to grant financial reimbursement in 8(a)(5) cases and hold that the grant of such relief is appropriate in the instant case.[9] At the very least, the Court should require the Board to provide a *real* explanation for its failure to do so.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the additional relief requested below, but denied by the Board, is both appropriate and necessary in order fully to remedy Presto's unlawful refusal to bargain and to restore the status quo prior to said violation of the Act. The Court should, therefore, modify the Board's order accordingly or remand to the Board for reconsideration only that portion of its Decision and Order denying the additional relief requested. In all other respects, the Board's order should be fully enforced at this time.

Respectfully submitted,

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[9] The specific *quantum* of damages would, of course, be determined during the compliance stage of the proceedings below.

APPENDIX

Statutes Involved

National Labor Relations Act, as amended, 29 U.S.C. §151, *et seq.*, 61 Stat. 136:

Section 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Section 8(a). It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * *

Section 10(c). The testimony taken by such member, agent, or agency of the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: . . . .

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,051

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, Petitioner

versus

NATIONAL LABOR RELATIONS BOARD, Respondent
PRESTO MANUFACTURING COMPANY, Intervenor

No. 22,313

PRESTO MANUFACTURING COMPANY, Petitioner

versus

NATIONAL LABOR RELATIONS BOARD, Respondent

BRIEF FOR PETITIONER IN CASE NO. 22,313
AND INTERVENOR IN CASE NO. 22,051

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BRIEF FOR PETITIONER IN CASE No. 22,313
AND INTERVENOR IN CASE No. 22,051

STATEMENT OF ISSUE PRESENTED FOR REVIEW

The issue presented in Case No. 22,313 is whether the Board properly certified the Union as the exclusive representative of the employees in an appropriate unit.

The issue presented in Case No. 22,051 is whether the Board Order is reasonable and proper.

(The pending cases have not previously been before this Court under the same or any other title.)

STATEMENT OF THE CASE

A. Nature of the Case

Case No. 22,051 is before the Court on the petition of the International Brotherhood of Electrical Workers, AFL-CIO (herein called "IBEW") to review an Order of the National Labor Relations Board issued June 24, 1968. Case No. 22,313 is before the Court on the petition of Presto Manufacturing Company (herein called "Presto") to review and set aside the same Order of the Board. The Board has filed a cross application for enforcement of its Order and its motion to consolidate both cases for all purposes was granted on October 29, 1968. The Court has jurisdiction under Section 10 (f) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Section 151, et seq.) The Board's Decision and Order are reported at 172 NLRB No. 30.

B. The Proceedings Below

1. The Representation Case, Case No. 15-RC-3670

On May 19, 1967 IBEW petitioned for an election among the production and maintenance employees of Presto in its Jackson, Mississippi plant. Pursuant to a Decision and Direction of Election of the Regional Director on June 30, 1967, an election was held on August 11, 1967 in which IBEW received 334 votes and 245 votes were cast against union representation, and there were 29 challenged ballots.

On August 18, 1967, Presto filed Objections to the Conduct of the Election. These Objections were overruled in their entirety by the Regional Director in his Supplemental Decision and Certification of Representative which issued on November 9, 1967. The Supplemental Decision was based upon an informal investigation conducted by a representative of the Board's regional office. There was no hearing on the Objections. Presto filed objections with a variety of grounds for setting the election aside.[1] The challenge to the

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[1]In addition to the misrepresentations here asserted as grounds for denying enforcement of the Board's Order, Presto alleged that IBEW had misrepresented the wage and union situations at two other plants in Jackson, Mississippi, that IBEW had sought to inflame racial feelings in the plant, that the Board had improperly permitted the processing of IBEW's election petition in this case without affording Presto an opportunity to vindicate itself of IBEW's objections in the previous election, and that IBEW improperly capitalized on its expulsion from membership of a company supervisor immediately prior to the election. In view of the appropriate standard of judicial review, which restricts the Court to review of the substantiality of evidence, these issues are not discussed herein.

validity of the representation election before the Court involves certain Union misrepresentations which were included in handbills distributed to the employees on July 20, 1967, August 10, 1967, and August 11, 1967.

The handbill of July 20, 1967 (page 5 of the Regional Director's Decision) was issued subsequently to an election handbill wherein Presto had announced to the employees that an election date had been set: "While you were away we arranged with the Government to hold an election August 11 to decide whether you want or do not want the union." (Regional Director's Decision, pages 7 and 20) In its handbill of July 20, IBEW referred to the statement and commented as follows: "We have told you people Time after Time that *The Company was dealing with the NLRB behind your backs and there was nothing the IBEW could do about it.* So, Mr. Hall finally Told the Truth. He confirmed in writing what the IBEW has been telling you all along." (App. 82)

By letter dated July 28, 1967, Presto, through its attorney, wrote the Regional Director of the Board and requested him to require the IBEW to retract its charge that the NLRB and Presto were dealing behind the backs of the employees. The letter requested that the Regional Director send Presto a letter stating that he had had no dealings behind the backs of the employees. The letter indicated that the reply of the Regional Director would be shown to the voters so that their ballots would be cast independent of any misapprehension concerning the integrity of the National Labor Relations Board. (App. 83-85) No copy of

the letter to the Regional Director was served upon the IBEW. On August 4, 1967, the Regional Director served a copy of this letter upon all parties to the proceedings, including separate service upon IBEW, its attorney, and its international representative. (App. 86) This letter characterized the letter from Presto's counsel as an ex parte communication prohibited by Sections 102.126, 102.128(a) and 102.129(a) of the Board's Rules and Regulations (the text of these sections are reproduced in the Appendix to this Brief). Such service provided for a response subsequent to the holding of the election itself under the provisions of Section 102.133 (a).

On August 10, 1967, the day preceding the election, the Union distributed a handbill to the employees which included the following:

> "After 13 long years of business and This Company does not have a pension plan for it's (sic) employees, and They are telling you that you have not been mistreated? Now I know that some of you people are still young enough that you are not thinking too much about retiring but *NOW is The Time you should secure your Pension Plan, so you won't have to worry about it in the future.*
>
> * * * *
>
> "Yes, You have an Insurance Plan, but *What Good Is It??* Have you ever had to use it? For those of you who have used it, You Know

How Lousy It Is. But for those of you who have not used it, Let me give you some examples!

* * * *

"A most recent case, Ask Thomas Barnett about his Policy. His wife just had a Baby and The Presto Insurance policy paid a lousy $80.00 on the hotel bill, and a lousy $90.00 on the doctor bill. He still owes 300 and some odd dollars. Where is he going to get it? He sure doesn't make enough at Presto to make ends meet.

* * * *

"I understand that the company is supposed to pay the same amount that you pay. That would make $1.70 from you, $1.70 from the company, which means the insurance company should be receiving $3.40 per week and for $3.40 a week you should be able to get a real good policy.

"I wonder if the company is paying their share? It might be worth looking into."

On the day of the election, the Union issued a leaflet which concerned itself with the company's personnel consultant and the fees which had been paid to him by Presto and its affiliated companies. The Union referred to it as follows:

"He is what we call the Union Buster, and he has been running around the plant all this week.

"WHAT'S THE FEE OF THE O.L.C.??

"Well, take a look at the money that Presto is paying this man to keep the Union out of this plant. These figures came from the U. S. Labor Department in Washington, D. C."

The leaflet then contained a reproduction of the amount of money paid to the consultant as shown on a report filed with the Department of Labor. It totaled $14,901.63 in fees and out of pocket expenses for the year 1966, the IBEW's handbill went further:

"No wonder Mr. Hall only gave you a Lousy 8¢ increase this year. Why didn't they give you this money in wage increases instead of giving it to the Union Buster. Note, that the above fee's (sic) and expenses was for 1966, and they only show what he turned in. Did you notice that all of the payments were CASH.

"I wonder how much they have paid HIM THIS YEAR?"

Presto also objected to the Board's requirement that it submit a list of the names and addresses of the employees in the voting unit to be turned over to IBEW to assist it in the election campaign. This list, required under the Board's rule enunciated in *Excelsior Under-*

wear, Inc., 156 NLRB 1236, was submitted under protest with the company reserving its right to file objections based upon the requirement of the list.

The Board declined to review the finding of its Regional Director that there were no substantial and material issues affecting the election. Presto filed a Motion for Reconsideration, specifically requesting an interpretation of those sections of the Board's Rules and Regulations which had been construed by the Regional Director. This Motion was denied by the Board.

2. *The Unfair Labor Practice Case, Case No. 15-CA-3211*

Upon a charge filed by the IBEW, the Board issued a Complaint and an Amended Complaint, alleging that Presto violated Section 8 (a) (5) and (1) of the Act by refusing to bargain with the Union. Presto has refused to bargain as a means of securing court review of the Board's overruling of the Objections to the Election.

Upon the filing of a Motion for Summary Judgment by the General Counsel, Presto filed an opposition and requested a hearing. The Motion was granted by the Trial Examiner who found that Presto had refused to bargain with the certified representative of its employees. Neither General Counsel nor IBEW sought an extraordinary remedy before the Trial Examiner. Consequently, his recommended order simply required that Presto bargain, upon request, with IBEW, with no discussion of the remedies now sought by IBEW.

Both Presto and IBEW filed exceptions to the Trial Examiner's Amended Decision. For the first time, IBEW requested access to the employees on company premises, backpay, and the other remedies now sought from this Court. The Board sustained the Trial Examiner's Amended Decision and ordered the conventional refusal to bargain remedy.

SUMMARY OF ARGUMENT

A. The Validity of the Election

The Board has considerable discretion in establishing the standards for evaluating the fairness with which its elections are conducted. Judicial review is concerned with whether substantial evidence supports its findings and conclusions within the framework of that policy.

Although the Board's standards for measuring the effect of misrepresentations on employee choice in an election are proper, they were improperly applied in this case. It failed to follow its own precedent in deciding the time within which the other party to the election may reply to the misrepresentation. It incorrectly characterized certain misrepresentations as purely campaign propaganda.

Presto has established that IBEW misrepresented that the company was guilty of improper relations with the Board under circumstances preventing Presto from dispelling its effect upon employees. IBEW misrepresented the insurance benefits being received by

employees, repeated misrepresentations concerning their pension plan, and misrepresented that Presto was paying money rightfully theirs to prevent unionization. It has established a prima facie case of unfairness in conduct affecting the results of the election, and there is not substantial evidence in support of its contrary conclusion. Therefore the Board order directing Presto to bargain, upon request, should be denied enforcement.

B. The Board's Order

If the Court finds that the Board's order should be enforced, it should find that it is reasonable and proper to remedy the unfair labor practices found. The Act does not provide for direct review of Board decisions in employee representation proceedings. The only method by which an employer may secure court review of such agency action is by refusing to bargain and thereby to test the Board's election process through an unfair labor practice proceeding. This is what Employer has done in this case and has been charged with no other unfair labor practice in this proceeding.

The granting of an extraordinary remedy in this type of proceeding would have the effect of punishing the Company for pursuing the statutory method of reviewing Board election proceedings and could effectively prevent the exercise of a statutory right.

The provisions of Section 8 (d) of the Act provides that the obligation to bargain shall not include the compulsion to agree to a proposal or require a con-

cession. The effect of an order in this proceeding requiring the payment of backpay to employees would both require a concession and determine the amount of such concession in the proceeding which itself determined the existence of the duty to bargain.

The rights of employees and the Union are protected by the Board's order. The purpose of the remedy is to restore the status quo. An order to bargain satisfies this purpose and accords with the policies of the Act.

ARGUMENT

A. The Validity of the Election

Congress has entrusted to the Board "a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *NLRB* v. *A. J. Tower Co.*, 329 U.S. 324, 330, 67 S. Ct. 324, 91 L. ed. 322 (1946). This has been construed by the Seventh Circuit as follows:

> "The Board's wide discretion lies in the initial promulgation of rules and regulations, while the court exercises its duties in reviewing decisions involving application of the Board's rules. Judicial review in these cases is not concerned with the wisdom of the Board's policy but must determine whether the record as a whole supports the findings and conclusions respecting compliance with the policies, rules,

and regulations promulgated by the Board. *Celanese Corp.* v. *NLRB,* 291 F2d 224, 225, (7th Cir., 1961), cert. den., 368 U.S. 925, 82 S. Ct. 360, 7 L. ed. 2d 189 (1961).

While recognizing the degree of discretion reserved to the Board, this Court has not restricted its review of Board decisions in election situations to whether or not the Board acted arbitrarily or capriciously. *N.L.R.B.* v. *National Truck Rental Co.,* 99 U.S. App. D.C. 259, 239 F2d 422, 425-426 (1956).

The Board utilizes three criteria in evaluating misrepresentations during election campaigns: (1) whether or not the misrepresentation was of a material fact; (2) whether the misrepresentation came from a party with special knowledge of the true fact; and (3) whether the opposing party had sufficient opportunity to correct the misrepresentation. These criteria have generally been approved by the courts. This Court has found their use "unobjectionable and within the competence of the Board." *Steelworkers* v. *N.L.R.B.,* U.S. App. D.C. 393 F2d 661, 664, (1968).

The Court in *N.L.R.B.* v. *Houston Chronicle Publishing Co.,* 300 F2d 273, 278 (5th Cir. 1962), referred to these criteria and characterized them as "merely useful factual tests for ascertaining whether the legal standards have been transgressed; that is, whether the effect of circumstances surrounding an election was such that the results of the election reflects the desires of the employees, free of improper influences."

The Board improperly applied these criteria in its conclusion that the alleged misrepresentations by IBEW did not raise substantial and material issues, affecting the outcome of the election which required a hearing to determine the impact of the conduct on the election.

1. The Misrepresentation That the Board and the Company Were Dealing Behind the Backs of the Employees

Employer has a period each summer during which the entire plant is closed down and employees are on vacation. During this time in 1967, the Regional Director's Decision and Direction of Election was issued. Routinely, the Board's agent called representatives of the Union and of the Company on the telephone and arranged for an election including the date and the usual details incident thereto. When the employees returned to work, Employer notified them of the fact that an election had been set in a bulletin which stated: "While you were away, we arranged with the Government to hold an election August 11th to decide whether you want or do not want the Union."

On July 20, 1967, IBEW handbilled all of the unit employees with a bulletin which contained the following: "We have told you people Time after Time that the Company was dealing with the N.L.R.B. behind your back and there was nothing the I.B.E.W. could do about it." (App. 82)

The misrepresentation by IBEW referred to Presto's statement that it had arranged with the Government for an election. It claimed that it was a confession that previous accusations by the IBEW that the Company was dealing with the National Labor Relations Board behind the backs of the employees were true. The leaflet does not say that the Company was *trying* to deal with the Board. It says that it *was* dealing with the Board behind the backs of the employees. Therefore, the misrepresentation dealt not merely with the actions of Presto, but also with the action of the Board. Employees could only believe that both entities were aligned against the employees, for parties do not deal behind the back of another except to his detriment.

The Regional Director's treatment as a prohibited ex parte communication of the Company's request for assistance in dispelling the effects of the Union's representation to the employees of impropriety in the relationship between the Company and the Board placed the Company in an untenable position. It could not refute the Union's accusation. Under the circumstances, no statement by Presto could have had any effect on its employees' beliefs on this issue. The Regional Director was the official who had ruled upon the issues surrounding the election itself and had directed the election. The letter from him characterizing this as an unauthorized ex parte communication had the same effect upon employees as an *adjudication* that it was such, and thus within the misrepresentation made by the IBEW.

The Company's credibility, thus impaired, is a circumstance within which subsequent misrepresentations by the Union must be evaluated. Inasmuch as the impairment proceeded directly from the Regional Director's action in reliance upon the Board's Rules and Regulations, the correctness of his interpretation is an issue before this Court. Certainly, Presto cannot complain if he properly treated its letter as a prohibited ex parte communication.

As the promulgator of its own Rules and Regulations, an interpretation of the Board would be entitled to special weight. In this situation, however, the Board has not interpreted the provisions involved. Presto's Motion for Reconsideration of the Board's refusal to grant its Request for Review of the Supplemental Decision specifically requested an interpretation of these provisions. The Board declined to do so. It cannot be determined whether it declined to review the Supplemental Decision because it agreed with the Regional Director's interpretation or whether it considered an erroneous interpretation as not material to the outcome of the election.

Section 102.128 defines an unauthorized ex parte communication in three aspects: (1) the time or stage of the proceeding; (2) the subject matter of unauthorized communications; and (3) the persons to whom said communications are prohibited. Ex parte communications are unauthorized only "from the stage of the proceeding specified until the issues are finally resolved for the purposes of that proceeding under prevailing rules and practices." Section 102.128 (a) refers to the

pre-election proceeding under Section 9 (c) (1) or 9 (e). Therefore, this section refers to the hearing which was held in this proceeding under the authority of Section 9 (c) (1). That hearing was held, and the Decision and Direction of Election of the Regional Director had issued on June 30, 1967. It was at the time of the opening of this hearing that prohibitions of ex parte communications began. Insofar as the Regional Director and/or his legal assistants were concerned, there was no further activity with regard to the hearing under Section 9 (c) (1) subsequent to June 30, 1967.

Even if the prohibition extended through the action of the Board on Presto's Request for Review, the letter of July 28, 1967 would have not been a prohibited communication since the Board had refused the Request for Review on July 26, 1967. Accordingly, the letter was neither mailed nor received within the time period prohibited in Section 102.128 and 102.128 (a). It made no reference to any issues litigated at the hearing under Section 9 (c) (1), since it was concerned with activities of the Union in connection with the campaign itself. If the cited sections were construed to prohibit all communications with a regional director after hearing opened, there would be no necessity for Section 102.128 (b). The very existence of Section 102.128 (b) shows that the prohibition on ex parte communications in Section 102.128 (a) must terminate at some time, since otherwise there would be no necessity for the beginning of a new prohibition.

These provisions clearly have to do with the adjudicative aspect of the duties of various Board employees

and are designed to prevent attempts to influence improperly the decision-making processes of the Board and its constituent elements. The subject letter was directed to the Regional Director in his administrative capacity at a time when there was no issue pending before him for decision, and did not relate to his adjudicative functions under the Act.

Representations involving the Board during election campaigns partake of two aspects. In one, the misrepresentation may be that the Government favors the party making the assertion. See e.g., *N.L.R.B.* v. *Bata Shoe Company*, 377 F2d 821, 828 (4th Cir. 1967), cert. den. 389 U.S. 917, 19 L. Ed. 2d 265, 88 S. Ct. 238 (1967). Or, as in the present case, the declarant may represent that the other party is improperly involved with the Board. *N.L.R.B.* v. *Lord Baltimore Press, Inc.*, 370 F2d 397, 402-403 (8th Cir. 1966). In the latter situation, it would be expected that employees would turn to the union which exposed the company's chicanery. Its "electioneering significance . . . would naturally lie in its thrust at the integrity of the employer in respect to its labor relations . . . ." *Ibid*, p. 402.

In judging the effect of a misrepresentation, the second of the Board's criteria relates to the believability of the statement. As stated by Judge Aldrich in *N.L.R.B.* v. *A. G. Pollard Company*, 393 F2d 239, 242 (1968):

> "In judging the effect of a misrepresentation the test cannot be whether the speaker in fact had special knowledge, but must be whether

> the listeners would believe that he had. A misrepresentation by one having prime access to pertinent facts would be of no consequence if, for some reason, his listeners did not think him believable. On the other hand, a misrepresentation by one in fact having no knowledge at all would be effective if he was thought to be credible." (footnote omitted)

Believability is not exclusively the result of real or apparent special knowledge. In this case the Union's misrepresentation concerning the Employer's integrity received added credence from the treatment of the letter.

2. *The Misrepresentations on the Eve of the Election*

In a leaflet of August 7, 1967, IBEW made the claim that the Company had no pension plan. (Regional Director's Supplemental Decision). Presto in a handout on August 4 had listed the pension plan as one of its benefits. In the leaflet issued on August 10, 1967, the IBEW reiterated its false representation that there was no pension plan by stating that: "After 13 long years of business and This Company does not have a pension plan for its employees . . . ." The Union stated further: ". . . *NOW is The Time you should secure your Pension Plan, so you won't have to worry about it in the future.*" The leaflet continued with further representations that there is no pension plan.

The same leaflet contained several misrepresentations with regard to the insurance plan. It stated that a specific named employee had a claim for maternity benefits for which the insurance policy paid only $80.00 on the hospital bill and $90.00 on the doctor bill. The claim had not been filed. In fact, the employee was entitled to $100.00 on his doctor bill. The leaflet claimed that after payment that the employee still owed: "300 and some odd dollars." In fact, the hospital bill, before payment of benefits, amounted to $219.25, including television and a private room. The Doctor's bill was $175.00 so that the total bill was $394.25, and, after payment of benefits, the amount due was $214.25.

By giving the name of the employee and purporting to be authoritative and truthful, the employees could not have believed other than that this was factual. Most employees use semi-private accommodations and forego the luxury of television sets. The total maternity costs, before reimbursement by insurance, are normally about the same as those which the Union misrepresented to be the amount due after reimbursement.

The Union continued in the leaflet to misrepresent the insurance. It stated that the Company should be matching the amount paid by the employees. Speaking from its expertise as a representative of employees, it implied that a better policy would be secured if the Company would only pay as much as the employee. In fact, the Company was paying $2.58 per week for each employee's insurance.

This leaflet was distributed by the Union on August 10, within 24 hours of the election, and the Company did not have an adequate opportunity to rebut the false assertions. With regard to the employee used as an illustration, he did not file his claim on the doctor bill until September 11, 1967, and Employer did not know until then the facts.

This is a material misrepresentation of the kind which the courts have held to justify setting aside elections. "Purportedly authoritative and truthful assertions concerning wages and pensions . . . are not mere prattle; they are the stuff of life for Unions and members, the selfsame subjects concerning which men organize and elect their representatives to bargain." *N.L.R.B.* v. *Houston Chronicle Publishing Co., supra,* page 280. See also *N.L.R.B.* v. *Bonnie Enterprises, Inc.,* 341 F2d 712, 714 (4th Cir. 1965), in which the Court finds material representations regarding pension plans.

Of critical significance is the fact that the reference to the pension plan is a *repetition* of a misrepresentation on the very eve of the election and directly in the fact of a contradiction by Employer. In *Gummed Products Co.,* 112 NLRB 1092, 1094, the Board considered this a factor militating in favor of setting the election aside.

The Court in *Schneider Mills, Inc.* v. *N.L.R.B.,* 300 F2d 375, 380 (4th Cir. 1968) stated that "To the extent that previously made misrepresentations were repeated, we think that their vitiating effect on the validity of the election can be obviated only if the company had

a second opportunity to make an effective reply, whether the company availed itself of the opportunity or not."

The Regional Director found that the misrepresentations distributed on August 10, the day before the election allowed sufficient time and ample opportunity for the Employer to make answer had it cared to do so. Both *Hollywood Ceramics,* 140 NLRB 221 and *United Gypsum Company,* 130 NLRB 901 involve misrepresentations made by the union on the day preceding the election and at approximately the same amount of time before the actual balloting. In both cases, the Board relied upon the *absence* of sufficient time for the employer to make an *effective* reply.

Additionally, the specific insurance claims about which the Union made misrepresentations in its insurance leaflet were not presented to Employer until September 11, 1967 — a full month *after* the election. Employee concern is exclusively with how much will be paid by *them* after the use of insurance benefits. Thus, a policy is good or bad depending upon the degree to which it covers the amount of their claim. The misrepresentation was not simply concerned with the provisions of the insurance coverage. If Presto stated the amounts payable on an insurance claim, this would be a futile attempt to dispel the misrepresentations contained in a leaflet which falsely represented the amount still to be paid by individuals. The Company had neither the knowledge nor means to get the amount of Thomas Barnett's claim and/or the amount

to be paid by him after application of his insurance benefits.

The fact that the misrepresentations were of some matters of which Presto had knowledge does not prevent consideration of their effect upon the outcome of the election. See *N.L.R.B.* v. *Trancoa Chemical Corp.*, 303 F2d 456 (1st Cir. 1962). The misrepresentations included references to conditions at the employer's plant and the company made a reply, albeit ineffectively. *N.L.R.B.* v. *Bata Shoe Company, Inc., supra,* was set aside on a misrepresentation that the employer had union contracts in other locations.

3. The Election Day Misrepresentations

On the day of the election IBEW distributed handbills which misrepresented the amount and reason for the payment of funds to Presto's labor relations consultant. As pointed out on page 10 of the Regional Director's Supplemental Decision, services by him have been a part of Presto's personnel program since long before the Union ever began any organizational campaign in Jackson. His services for which the payments listed in the Union leaflet were made, were performed for five separate plants of Presto in widely dispersed geographical areas.

The Regional Director found that there was not an adequate opportunity for reply to this misrepresentation, but held that it came within the bounds of permissible misrepresentation. The Union's last minute leaflet purports to be "official records of the United

States Government." Employees were not in a position to evaluate the truthfulness or falsity of the Union's representation. They could only reasonably believe that the official Government records quoted represented not only the amount but also the purpose for which the funds were paid — that purpose claimed by the IBEW. The amount of money including fees and expenses totals $14,901.63, which would seem an enormous sum to the individual employees if paid for the purposes claimed by the Union. In fact, it is not disproportionate.

An employee believing it paid for the sole purpose of keeping a union from the Jackson plant would certainly accept it as factual and would be resentful.

The Board has held that a misrepresentation with regard to an employer's inequitable distribution of his funds is objectionable conduct and does have a substantial effect on employee votes in an election. *Halsey W. Taylor Co.*, 147 NLRB 16, 19. The employees could not evaluate the bulletin as solely election propaganda. They would certainly accept the representation of official fact under the guise of Government records.

Thus the criteria of *Hollywood Ceramics, supra,* at page 224 have been met. A substantial departure from truth was made at a time which prevented the other parties from making an effective reply and the misrepresentations, whether deliberate or not, reasonably may be expected to have had a significant impact upon the election. "The union would not have made such statements if it had not believed that they would

be material in influencing the vote. There was no time for rebuttal of the false statement." *Celanese Corporation* v. *N.L.R.B., supra,* page 226.

4. The Excelsior Rule

The First Circuit found that the rule of the Board requiring the furnishing of the names and addresses of employees by an employer for use of the union was invalid because it was not promulgated in accordance with the provisions of the Administrative Procedures Act. *Wyman-Gordon Co.* v. *N.L.R.B.,* 397 F2d 394, 68 LRRM 2483 (1st Cir. 1968), cert. granted,

In view of the fact that certiorari has been granted, the determination of its validity cannot be made in this proceeding. In the event, however, that the Supreme Court sustains the decision of the First Circuit, the forced compliance of Presto with this rule had a material and substantial effect on the outcome of the election. The intent of the Board's rule was to assist the Union in its organizational efforts. See *Excelsior Underwear, Inc., supra.* Therefore, the outcome of the election was affected by reason of their increased ability to see and convert Union adherents. If the rule is invalid, the assistance to the Union was the result of an improper exercise of the Board's authority and it should be grounds for setting the election aside.

B. The Board's Order is Reasonable and Proper Under the Violations Found

The extraordinary relief requested by the IBEW in

this case has been granted in only those cases involving massive violations by an employer. This Court, in granting enforcement of most of the Board's order in *IUE* v. *NLRB*, 127 U.S. App. D.C. 303, 383 F. 2d 230 (D.C. Cir. 1967), noted in footnote 4 that giving access of one hour to a union in the company's plant was "fairly strong medicine." The Court approved such a remedy because of the "aggravated circumstances" in that case.

As set forth in the brief of IBEW, the Union's efforts to organize the employees of Presto has extended over a period of more than two years. During that period, in a plant in which there were more than 600 employees, the only violations of the Act found by the Board, other than the technical refusal to bargain in this case, consisted of three conversations, involving two minor supervisors, over two years ago. Under these circumstances a remedy which does more than pass upon the validity of the election and confirm the certification of the union would be punitive and a punishment of Presto solely for its use of the procedures provided by the Act for reviewing Board election decisions. This Court has recognized the difficulty of requiring the payment of money as a part of the remedy in a refusal-to-bargain case. *UAW* v. *NLRB*, U.S. App. D.C. , 392 F. 2d 801, 810 (1967), cert. den. 392 U.S. 906, 20 L. Ed. 2d 1364 (June 10, 1968). It is apparent from the statute that any bargaining order requiring the giving of a pay increase to employees is the forcing of a concession rather than the enforcement of a concession already made and that it is unambiguously prohibited by the terms of Section 8(d).

Stripped of nonessentials, the Union's argument is essentially that the passage of time may have dissipated its majority status. Existing remedies adequately protect its interest in such event. See *Franks Bros. Co.* v. *NLRB*, 321 U.S. 702, 704-5, 64 S. Ct. 817, 88 L. Ed. 1020 (1944). As pointed out by this Court, "If a union loses its majority . . . because the company wrongfully refused to bargain with it, restoration of the status quo calls for Board recognition of the union." *Local 57, International Ladies Garment Workers Union, AFL-CIO* v. *NLRB*, 126 U.S. App. D.C. 81, 87, 374 F. 2d 295, 301, cert. den., 387 U.S. 942, 87 S. Ct. 2078, 18 L. Ed. 2d 1328 (1967). In other words, the union is placed in its status as the collective bargaining representative of the employees with its full rights and responsibilities just as if the employer had recognized it on the day following the election.

CONCLUSION

Presto respectfully requests the Court to find that the unfairness of the Union's campaign prevented the holding of a valid election free of improper influence. Accordingly, it is requested that the Court would decline enforcement of the Board's order as not supported by substantial evidence on the record as a whole.

In the event the Court finds that a bargaining order is appropriate, the Board's order is reasonable and proper under all the circumstances and it is requested that it be enforced in accordance with its existing terms.

Respectfully submitted this 5th day of December, 1968.

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CERTIFICATE OF SERVICE

I certify that copies of the foregoing brief have been served upon opposing counsel of record by placing the same properly addressed in the United States Mail with adequate postage affixed thereto.

Andrew C. Partee, Jr.

APPENDIX

Statutes Involved

National Labor Relations Act, as amended, 29 U.S.C. § 151, *et. seq.*, 61 Stat. 136:

> Section 8 (a). It shall be an unfair labor practice for an employer —
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).
>
> * * * *
>
> Section 8(d). For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a pro-

posal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification —

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9 (a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

* * * *

Section 10 (f). Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

* * * *

Rules and Regulations of the National Labor Relations Board, Series 8, as amended, 31 F.R. 13850:

Section 102.126 *Unauthorized communications.* — No person who is a party to, an agent of a party to, or who intercedes in, an on-the-record proceeding of the types defined in section 102.128, shall make an unauthorized *ex parte* communication to Board agents of the categories designated in that section, concerning the disposition on the merits of the substantive and procedural issues in the proceeding.

* * * *

Section 102.128 *Types of on-the-record proceedings; categories of Board agents; and duration of prohibition.* — Unless otherwise provided by specific order of the Board entered in the proceeding, the prohibition of section 102.126 shall be applicable in the following types of on-the-record proceedings to unauthorized *ex parte* communications made to the designated categories of Board agents who participate in the decision, from the stage of the proceeding specified until the issues are finally resolved by the Board for the purposes of that proceeding under prevailing rules and practices:

(a) In a preelection proceeding pursuant to section 9 (c) (1) or 9 (e), or in a unit clarifica-

tion or certification amendment proceeding pursuant to section 9 (b), of the act, in which a formal hearing is held, communications to the regional director and members of his staff who review the record and prepare a draft of his decision, and members of the Board and their legal assistants, from the time the hearing is opened.

(b) In a postelection proceeding pursuant to section 9 (c) (1) or 9 (e) of the act, in which a formal hearing is held, communications to the hearing officer, the regional director and members of his staff who review the record and prepare a draft of his report or decision, and members of the Board and their legal assistants, from the time the hearing is opened.

* * * *

Section 102.33 — *Receipt of prohibited communications; reporting requirements.* — (a) Any Board agent of the categories defined in section 102.128 to whom a prohibited oral *ex parte* communication is attempted to be made shall refuse to listen to the communications, inform the communicator of this rule, and advise him that if he has anything to say it should be said in writing with copies to all parties. Any such Board agent who receives a written *ex parte* communication which he has reason to believe is prohibited by this subpart shall promptly forward such communication to the

Office of the Executive Secretary if the proceeding is then pending before the Board, to the chief trial examiner if the proceeding is then pending before a trial examiner, or to the regional director involved if the proceeding is then pending before a hearing officer or the regional director. If the circumstances in which the unauthorized communication was made are not apparent from the communication itself, a statement describing those circumstances shall also be submitted. The executive secretary, the chief trial examiner, or the regional director to whom such a communication is forwarded shall then place the communication in the public file maintained by the agency and shall serve copies of the communication on all other parties to the proceeding and attorneys of record for the parties. Within 10 days after the mailing of such copies, any party may file with the executive secretary, the chief trial examiner, or regional director serving the communication, and serve on all other parties, a statement setting forth facts or contentions to rebut those contained in the unauthorized communication.

Nos. 22,051 and 22,313

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

PRESTO MANUFACTURING COMPANY,
Intervenor.

PRESTO MANUFACTURING COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petitions to Reveiw and Cross-Application
to Enforce an Order of
The National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

ISSUES PRESENTED FOR REVIEW

The questions presented, as formulated in the pre-hearing conference stipulation (J.A. 172-175)[1] are as follows:

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[1] J.A. refers to those portions of the record printed as a joint appendix to the briefs. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

A. In case No. 22,313, the issue is:

Whether the Board properly certified the Union as the exclusive bargaining representative of the employees in an appropriate unit.

B. In case No. 22,051, the issue is:

Whether the Board's order is reasonable and proper.

These cases have never previously been before this Court.

COUNTERSTATEMENT OF THE CASE

Case No. 22,313 is before the Court upon the petition of Presto Manufacturing Co. (hereafter called "the Company") to review and set aside an order of the National Labor Relations Board issued against it on June 24, 1968, pursuant to Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151 *et seq.*). The Board has cross-applied for enforcement of its order. The Board's Decision and Order (J.A. 170-171) are reported at 172 NLRB No. 30. In Case No. 22,051 the International Brotherhood of Electrical Workers, AFL-CIO, (hereafter "the Union") has petitioned to review and modify the Board's order insofar as it denied relief to the Union, the charging party before the Board. This Court has jurisdiction of the proceedings under Section 10(e) and (f) of the Act.

I. THE BOARD'S FINDINGS OF FACT

Briefly, the Board found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union certified by the Board, following the representation proceedings described below, as the exclusive representative of an appropriate unit of the Company's employees. The facts underlying this finding are summarized below:

A. The Representation Proceeding

On May 19, 1967,[2] the Union, pursuant to Section 9(c) of the Act, filed a representation petition with the Board requesting an election for certification as the exclusive representative for the production and maintenance employees at the Company's Jackson, Mississippi, plant (J.A. 1-3). The Regional Director issued a Decision and Direction of Election on June 30 (*Ibid.*). In the election, held August 11, the Union received 334 votes, 245 votes were cast against union representation and 29 ballots were challenged (J.A. 26).

Thereafter, the Company filed timely objections to the election (J.A. 19-25). The Regional Director, pursuant to Section 102.69(c) of the Board's Rules and Regulations (29 CFR 102.69(c)), conducted an investigation of the issues raised by the Company, affording all parties an opportunity to submit evidence.[3] The investigation disclosed no material issues of fact warranting a hearing, so none was held. Finding the Company's objections to be without merit, the Regional Director issued a Supplemental Decision and Certification of Representative on November 9, certifying the Union as the bargaining representative of the employees in the unit (J.A. 26-44). In overruling the objections which Presto presses before this Court,[4] the Regional Director found as follows:

1. The Company claimed in Objection No. 10 that the employees "were coerced, restrained and intimidated, and their rights were violated by

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[2] Hereafter all dates are 1967, unless otherwise specified.

[3] The Company submitted 34 exhibits—the campaign literature of both sides—with its objections to the election, as well as an affidavit from its personnel director (J.A. 45-99).

[4] The objections raised before the Board but abandoned here (Co. Br. 3, n. 1), are not discussed in our brief.

the Employer's having been required to submit a list of names and addresses of all employees eligible to vote to the Board, which was, in turn, submitted to the Union . . . " This objection was overruled because the production of the list was validly required by the election rule announced by the Board in *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966) (J.A. 31).

2. In regard to Objection No. 11, the Regional Director found that the statements objected to by the Company in two pieces of campaign literature constituted typical campaign propaganda "of the kind the Board declines to police or censor, but, rather leaves the evaluation thereof to the good sense of the voters" (J.A. 34; 82, 98). Thus, in Objection 11A, the employer complained of the Union's handbill (J.A. 82) alleging, *inter alia,* that "the Company is dealing with the NLRB behind your backs." The Regional Director observed that this statement was made in express response to an earlier Company handbill asserting that while the employees were on vacation, it (the Company) had "arranged with the Government to hold an election" (J.A. 52), and complained that the Union's attempt to secure an earlier election date had been frustrated by Company opposition (J.A. 82). Moreover, the Regional Director found that the three week interval before the election left the Company ample time to reply to the handbill. In making this finding, the Regional Director rejected the Company's claim that he had prejudiced the Company's ability to reply by forwarding to the Union, pursuant to the Board's rules governing *ex parte* communications (Board Rules & Regulations Sec. 102.126, 102.128, 102.129, 29 CFR 102.126, 102.128, 102.129), a copy of the Company's letter to him protesting the Union's language (J.A. 35; 83-86).

In objection 11B, the Company protested the Union claim that money paid by the Company to a personnel consultant, whom the Union styled a "union buster", was paid to keep the Union out of the plant. The Regional

Director also found this statement to be permissible campaign propaganda. The basic facts in the Union's handbill were truthfully shown in a reproduced Labor Department form, and the objectionable matters were obvious conclusions and inferences drawn by the Union which the employees could appraise, and which were not so misleading as to require setting aside the election (J.A. 35-36; 98).

3. Finally, the Regional Director dismissed Objection 14, in which the Company claimed that the Union's statements in two handbills about the Company's insurance and pension plans for employees were misleading (J.A. 40-43; 93, 97). The Company objected (1) to the Union statement that the employees had no pension plan, whereas the Company had stated in its handbill that the Company offered "a constantly improving retirement program at no cost to the employees" (J.A. 74); and (2) to the Union's misstatement that a particular employee had had a hospital bill of about $470, to which the Company's insurance plan only contributed $170, whereas in fact the total bill had been $394.25 of which the Company had paid $180; and (3) to the Union's implication that the Company's contribution to the insurance plan perhaps did not equal the employees' because, if it did, the employees " . . . should be able to get a real good policy" (J.A. 97).

In dismissing this objection, the Regional Director found that the employer had ample time to reply to both pamphlets, and had fully presented its position to the employees. He also pointed out that "the Employer knew better than anyone else the provisions of such insurance and pension plans," and was consequently able effectively to answer the Union's statements (J.A. 42-43).

B. The Unfair Labor Practice Proceeding

Pursuant to the certification, the Union requested recognition on November 15 and thereafter; the Company refused recognition on the basis that the certification was invalid (J.A. 157). The Union then filed the charge in the instant case and the Regional Director issued a complaint; the Company in its answer denied any violation of Section 8(a)(5).

On March 5, pursuant to the motion of the General Counsel, the Trial Examiner issued an order to show cause before March 20, 1968, why the motion for summary judgement should not be granted; on April 3, 1968, he granted the motion on the basis that the Company, in its response to the order to show cause, proffered no newly discovered evidence and he was therefore bound by the findings of the Board in the earlier representation case (J.A. 158; 145-147).[5]

Both the Union and the Company filed objections to the Trial Examiner's Decision. The Company objected both to the underlying certification and the summary judgment; the Union requested the Board to consider imposing additional remedies on the Company for the refusal to bargain. The Board, however, rejected the objections filed by both parties and adopted the Trial Examiner's Decision (J.A. 170-171).

II. THE BOARD'S ORDER

The Board's order (J.A. 171) requires the Company to cease and desist from the unfair labor practices found and, on request, to bargain collectively

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[5] The Company's response to the Order to Show Cause not having been received until March 21, 1968, the Trial Examiner's Decision originally issued without reference to it on March 27, 1968; thereafter the record was reopened and the late filed response was considered, and an Amended Decision was issued (J.A. 157).

with the Union as the exclusive representative of the employees, and to post appropriate notices.

ARGUMENT

I. THE BOARD PROPERLY OVERRULED THE COMPANY'S OBJECTIONS TO THE ELECTION

The sole issue raised by the Company's petition for review is whether the Board's certification of the Union is valid for, if so, the Company's admitted refusal to bargain violates Section 8(a)(5) and (1) of the Act. The Company contends that the Board should have set aside the election both because of pre-election statements by union representatives which allegedly interfered with the employees' free choice; and because the Union was improperly assisted by the Board's *Excelsior* rule, under which the Company was obliged to give the names and addresses of its employees to the Union. We show below that neither of these contentions warranted setting aside the election and, accordingly, the Board properly certified the Union.

A. The Union's Pre-election Statements

As the Company concedes, the question presented here – whether to set aside an election because of pre-election statements – is a matter which rests within the sound discretion of the Board. For, "Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees" (*N.L.R.B. v. A.J. Tower,* 329 U.S. 324, 330 (1946)). See also *N.L.R.B. v. Waterman S.S. Corp.,* 309 U.S. 206, 226 (1940); *N.L.R.B. v. National Truck Rental Co.,* 99 U.S. App. D.C. 259, 239 F.2d 422, 425-426 (1956), cert. denied, 352 U.S. 1016. The question before the Court is thus not whether substantial evidence supports the Board's determination that the

election was validly conducted, but whether the Board abused its discretion in determining that the conduct of which the employer complains did not, in all the circumstances, make a free and fair election impossible. *N.L.R.B. v. National Truck Rental, supra.*

The Board, seeking to "balance the right of the employees to an untrammeled choice, and the right of the parties to wage a free and vigorous campaign," has formulated certain guidelines as a means to determine whether a secret ballot election should be set aside. *Hollywood Ceramics Company, Inc.*, 140 NLRB 221, 224 (1962); *United States Gypsum Company*, 130 NLRB 901, 904-905 (1961). In striking this balance, the Board will overturn an election only where there has been a misrepresentation which "(1) involves a substantial departure from the truth, (2) at a time which prevents the other parties from making an effective reply, (3) so that the misrepresentation . . . may reasonably be expected to have a significant impact on the election" (*Hollywood Ceramics Co., supra,* at 224, cited with approval in *Steelworkers v. N.L.R.B. (Luxaire Co.)*, . . . U.S. App. D.C. . . . , 393 F.2d 661, 664 (1968). Moreover, even where a misrepresentation is substantial, the election will not be set aside if the employees are "in a position to know the truth of the fact asserted" *id.*, at 223. Finally, the burden is not on the Board to establish the validity of the election; rather, the objecting party must show with specific evidence that the election was not fairly conducted. *N.L.R.B. v. Mattison Machine Works,* 365 U.S. 123, 124 (1961). The burden thus assumed is a "heavy" one (*Shoreline Enterprises v. N.L.R.B.*, 262 F.2d 933, 942 (C.A. 5, 1959)), for "the results of a secret ballot election . . . should not be lightly set aside." *The Liberal Market, Inc.*, 108 NLRB 1481, 1482 (1954). We respectfully submit that the Company has not met that burden.

1. The Company objects to the Union's handbill distributed July 20 (three weeks before the election), which states in relevant part:

> Now lets take a look at Mr. Hall's so-called Handbill that was passed out on Monday. In the Second Paragraph he said, while you were away the Company arranged with the Government to hold an election.
>
> Well as you well know the I.B.E.W. wanted the election to be held the last part of May, but the Company said no. We have told you people time after time that the Company was dealing with the N.L.R.B. behind your backs, and there was nothing the I.B.E.W. could do about it (Ex. E-22).

The gist of the Company's complaint is that the phrase, "The Company was dealing with the N.L.R.B. behind your backs," aligned the Board with the Company in a serious charge of misdealing which could only influence employees to vote for the Union. Additionally, the Company claims that it was unable to reply to this charge in the intervening three weeks before the election because the Regional Director improperly disclosed to the Union, as a prohibited *ex parte* communication, the Company's letter to the Regional Director protesting the Union's charge. The Company argues that this action of the Regional Director further served to confirm the Union's claim that the Company and the Board were dealing with each other against the interests of the employees and the Union, and would have rendered futile any attempt by the Company – had one been made – to rebut the accusation.

Every aspect of this objection by the Company is, we submit, patently without merit. As the Regional Director noted (J.A. 32, n. 3, 34-35) and the Union handbill reveals, the "dealing behind your backs" statement was made in response to the Company's claim to the employees that "while you were away we arranged with the government to hold an election August 11th to decide whether you want or do not want the union" (J.A. 52). Thus, the original claim that the Company and the government were "aligned" came from the employer itself, not the Union.

The handbill also makes clear that the Union statement dealt only with the timing of the election, an issue which had been raised in earlier Union handbills calling attention to the Company's refusal to agree to a consent election and noting that the Board's agreement to an extension of time for the Company to file briefs had resulted in delay of the election until after the plant's summer vacation (J.A. 79-80). Thus, the factual claim made by the Union consisted essentially of the statement that the Board accepted the Company's desires for an election date over the objection of the Union – a misrepresentation which, we submit, the employees could properly evaluate as campaign propaganda, especially in light of the employer's original alignment of itself in favorable terms with the Board. No statement remotely comparable to that made in *N.L.R.B. v. Lord Baltimore Press,* 370 F.2d 397, 402-403 (C.A. 8, 1966) (Co. Br. 16), where the Union charged that the Board processes had been successfully subverted by the Company having "bought off" unfair labor practice charges, was made in this case. In short, the phrase objected to is part of the species of "exaggerations, hyperbole and appeals to the emotions of which election campaigns are made," *Schneider Mills v. N.L.R.B.,* 390 F.2d 375, 379 (C.A. 4, 1968); *Baumritter v. N.L.R.B.,* 386 F.2d 117, 120 (C.A. 1, 1967); Bok, *Regulating NLRB Election Tactics,* 78 Harv. L. Rev. 38, 88 (1964).[6]

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[6] *N.L.R.B. v. Bata Shoe Co.,* 377 F.2d 821, 828 (C.A. 4, 1967), cert. denied, 389 U.S. 917 (1967), is also factually different from this case since the statements there, as found by the Board, were clearly misrepresentations of the function of the Board, involving statements that the Board and the Union together would protect the benefits employees had under contracts with the Company. Moreover, the Court found that these misrepresentations did not interfere with the fairness of the election in light of the fact, also present in the instant case (see discussion below, pp. 11-12), that the employees had previous experience with Board elections and the Company had ample opportunity to reply.

Moreover, the Company had ample time – from July 20 to August 11 – to rebut the offensive implication of the phrase to which it objects, and to give its version of the facts surrounding the setting of the election. The Regional Director's action treating the Company's letter of protest as an *ex parte* communication and forwarding it to the other parties, cannot reasonably be said to have precluded the Company from answering the Union's assertions. Whether or not the Regional Director properly treated the letter as a prohibited *ex parte* communication, his action in so classifying it was irrelevant to the Company's opportunity to respond to the underlying "misrepresentation" of the Union handbill.

The Company's underlying argument is that its credibility was impaired by the Regional Director's treatment of the letter as *ex parte:* "The letter from him characterizing this as an unauthorized *ex parte* communication had the same effect upon employees as an *adjudication* that it was such, and thus within the misrepresentation made by the IBEW" (Co. Br. 13). But nothing in the Regional Director's letter – which merely states that he considers the Company communication to be *ex parte* under the relevant rules[7] – implies any approval of the Union's statements in the handbill which the letter protested. In fact, the Regional Director's rejection of the Company's attempt to deal directly with him, without notifying the other parties, belies the existence of any dealing behind the backs of the employees by the Company and the Board. Indeed, the Company's claim that the classification of the letter as *ex parte* made the Regional

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[7] The letter states "Pursuant to Section 102.133 of the Board's Rules and Regulations, Series 8, as amended, the undersigned hereby serves upon all parties a copy of the attached letter and attachment received by the undersigned on July 31, 1967, which the undersigned deems to be an *ex parte* communication within the meaning and intent of Section 102.126, 102.128(a) and 102.129(a) of said Rules and Regulations." (J.A. 86)

Director appear to the employees as the partisan of the Union not only assumes that the employees knew of the letter – there is no such showing in the record – but also assumes that the employees would misunderstand the letter.

In any event, even if the Company's ability to reply was hampered by the Regional Director sending the Union a copy of the Company's letter as a prohibited *ex parte* communication, we submit that the Regional Director acted correctly under the Board's rules.[8] The letter was written subsequent to the initial hearing on the representation petition and issuance by the Regional Director of his Decision and Direction of Election, but prior to the election and certification of the results thereof. Section 102.128 prohibits *ex parte* communications in certain types of on-the-record proceedings, "from the stage of the proceeding specified until the issues are finally resolved by the Board for the purposes of that proceeding under prevailing rules and practices." Subsection (a) of Section 102.128 makes that applicable "in a pre-election proceeding pursuant to Section 9(c)(1) . . . , in which a formal hearing is held . . . , from the time the hearing is opened." Subsection (b) makes the prohibition of Section 102.128 applicable "in a post-election proceeding pursuant to section 9(c)(1) . . . , in which a formal hearing is held, . . . from the time the hearing is opened."

The Company construes subsections (a) and (b) as dealing with two mutually exclusive categories, the one dealing with pre-election proceedings only, and the other with any post-election proceedings which might be

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[8] The Company concedes that its objection is without merit if the Regional Director's action was proper: "Certainly, Presto cannot complain if he properly treated its letter as a prohibited *ex parte* communication" (Co. Br. 14). The relevant sections of the Board's rules are set forth in the appendix to the Company's brief.

conducted. Such a construction is incorrect. Subsections (a) and (b) merely define the point in time when a representation proceeding becomes "on the record" and, out of considerations of fairness, *ex parte* communications are thereafter prohibited until the case is closed. For, "the issues [raised in a pre-election hearing] are finally resolved by the Board,"[9] not by the issuance of a Decision and Direction of Election, but by the final certification of the results of the election. See *Inland Empire District Council v. Millis,* 325 U.S. 697, 707 (1945); *N.L.R.B. v. Rohlen,* 385 F.2d 52, 56-57 (C.A. 7, 1967). The Company asserts that if the prohibition against *ex parte* communications in pre-election proceedings was intended by the Board to remain in effect until a certification issued, there would be no need for subsection (b), which prohibits *ex parte* communications in post-election hearings. The short answer to this argument is that in most representation proceedings, the "on-the-record" pre-election hearing has been waived by the parties.[10] Subsection (b) was intended to apply to those representation cases where no pre-election hearing has been held, but a post-election "on-the-record proceeding" has been ordered to consider challenged ballots or objections to conduct allegedly affecting the election. In sum, subsections (a) and (b), read together, are designed to impose a ban on *ex parte* communications for the duration of a representation case as soon as the first "on-the-record proceeding" is begun.[11]

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[9] Quoting from Section 102.128.

[10] According to the latest available figures, of 8,392 elections conducted in Fiscal Year 1966, 6,553 were conducted on the basis of stipulations and consent agreements which waive the pre-election hearing and go to an election without the issuance of a Decision and Direction of Election. Thirty-First, Annual Report of the National Labor Relations Board, p. 202, Table 11 (G.P.O., 1967).

[11] This construction is confirmed by subsection (c), which bans *ex parte* communications upon issuance by the Regional Director of his post-election report or decision, if no formal hearing has been held.

Thus, the Regional Director's action in serving the Company's letter on the other parties was proper under the Board's rules and cannot serve as a basis for setting the election aside. Besides, as we have already shown, under no circumstances could sending the Company's letter to the Union reasonably be said to have impaired the Company's ability to reply to the Union's charges.

2. The Company's second objection is that the Union, in two leaflets distributed four days and one day, respectively, prior to the election, falsely represented to the employees that their employer had no pension plan for them and that its insurance plan was inadequate. On August 7, the Union distributed the first challenged leaflet, which asked the Company a series of rhetorical questions. The first two of these were (J.A. 93):

> 1. WHY Don't You Have a Pension Plan?
> 2. WHY Don't You Have a Decent Insurance Program?

Then, on August 10, the Union distributed the other challenged leaflet which said, *inter alia* (J.A. 97):

> Pension Plan??
>
> What Pension Plan?? I didn't Know That you had one. Have you ever seen a copy of your pension Plan? After 13 Long Years of business, and This Company does not have a pension plan for its employees, and They are telling you that you have not been mistreated?? * * *
>
> Insurance Plan??
>
> Yes, You have an Insurance Plan, But What Good Is It?? Have you ever had to use it? For those that have used it, You Know How Lousy It Is. But for those of you that have not used it, Let me give you some examples!

1. Ask Charles Tucker how much it cost him when he had to use his insurance!

2. Ask George Kennedy what he still owes, after The Presto Insurance Policy Paid Off!

3. A most recent case, Ask Thomas Barnett about his Policy. His wife just had a Baby, and The Presto Insurance Policy Paid a Lousy 80 dollars on the Hospital Bill, and A Lousy 90 Dollars on The Doctor Bill. He still owes 300 and some odd dollars. Where is he going to get it? He sure doesn't make enough at Presto to make ends meet.

* * *

I understand that The Company is supposed to match the same amount that you pay. That would make $1.70 from you, and $1.70 from the Company, which means The Insurance Company should be receiving $3.40 per week. And for $3.40 per week you should be able to get a Real Good Policy.

I wonder If The Company is paying Their Share? It might be worth looking into.

* * *

With regard to the pension plan, it is evident that the Union said what it said in order to force the Company to disclose the terms of its pension plan to the employees. For, in an earlier handbill dated July 27, the Union challenged the Company to put in writing an alleged promise its representative had made to the employees that they would be given "an Improved Pension Plan If they Vote The Union Out." To this, the Company only responded with handbills on July 28, August 4, and August 7 which merely listed the pension plan as an existing benefit; they did not describe the plan in any detail or list any of its provisions, except to say

that it was "constantly improving" and "at no cost to the employees" (J.A. 74). Moreover, when the Regional Director investigated this objection, the Company's own personnel director told the investigator "that when the [pension] plan was instituted in 1961, Employer's president announced it to the employees; and, that the plan is explained to all new employees upon their being hired" (J.A. 42). The Company obviously thought that this information was sufficient, for it did not repeat the information during the campaign. Under these circumstances, the Board properly rejected the claim the Company makes now, that the employees were probably misled by the Union's rhetorical assertion that the employees had no pension plan.

Similarly, the context of the insurance plan "misrepresentation" in the disputed leaflets shows that the Union was really asking the employees to evaluate their own insurance plan as they knew it. The Company objects to one of the three examples cited by the Union in its August 10 leaflet to show the inadequacy of the insurance, on the grounds the figures given were incorrect. The Union asserted that a named employee's wife "just had a Baby, and the Presto Insurance Policy Paid a Lousy 80 dollars on The Hospital Bill, and a Lousy 90 dollars on The Doctor Bill. He still owes 300 and some odd dollars." Before the Board, the Company asserted, and the Board accepted as true, that the Company insurance actually paid $100 to the doctor, and that the employee's total out-of-pocket expense amounted to $214.25. The cases cited by the Company in its brief suggests the insubstantiality of the misrepresentation here. The Union claimed the Company had paid $170 out of approximately $470; the actual figures showed the Company paid $180 out of just under $400. In other words, while the Union asserted that the Company paid 36 percent of the employees' costs, the Company actually paid 9 percent more. Moreover, the Union named the claimant involved, invited his fellow employees to ask him about

his experience, and called upon them to examine their own experiences with the Company's insurance. Clearly, the handbill, while seeking to denigrate the existing insurance, did urge the employees to check the facts and judge for themselves. In contrast, the misrepresentations in *N.L.R.B. v. Bonnie Enterprises,* 341 F.2d 712 (C.A. 4, 1965), cited by the Company, involved not only union statements about contracts it had negotiated at other plants, but also claims that it had obtained pension plans, vacations, insurance programs and other benefits at those plants when they had not in fact done so.[12] And in *N.L.R.B. v. Houston Chronicle,* 300 F.2d 273 (C.A. 5, 1962), the misrepresentations concerned matters about which the employees would expect the union to have special knowledge. Those were cases, therefore, where the employees were not in as good a position as the Presto employees to make an independent judgment, but were called upon to rely on the union's word.

The Company also objects that the Union implied in its August 10 handbill that the Company was not paying as much in insurance premiums as it claimed to be. This argument again protests a comparatively innocent propaganda exaggeration. The Union directly claimed neither that the Company was obligated to equal employee contributions, nor that it was not meeting this obligation. Rather, the Union implied that it could get a better insurance plan for that amount of money – a normal campaign claim – and asked the employees to consider the adequacy of the benefits they had been receiving. In this connection, the Union invited the employees to ask the Company what the facts were about insurance plan contributions, again, in effect, challenging the Company to set forth the contents of the plan. Once more, we submit, this alleged misrepresentation was not such as to

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[12] Cf., *Pepperell Mfg. Co. v. N.L.R.B.,* 403 F.2d 520 (C.A. 5, 1968). (approximately 10 percent misrepresentation of wage rates at other plants held insubstantial).

render a fair election impossible, but was simply a typical, run-of-the-mine campaign statement which the employees were fully capable of appraising.

But even viewing the foregoing assertions by the Union as direct misrepresentations, they do not warrant setting the election aside. For, it is settled Board policy, approved by the courts, not to set aside an election because of campaign misrepresentations unless the Board finds it likely that such utterances had a significant impact on the election. *Linn v. United Plant Guard Workers,* 383 U.S. 53, 60-61 (1966); *Russell-Neuman Mfg. Co., Inc.,* 158 NLRB 1260, 1264 (1966), enf'd *per curiam* C.A.D.C., April 12, 1967, Nos. 20,217 and 20,415 (unreported); *N.L.R.B. v. Red Bird Foods, Inc.,* 399 F.2d 600 (C.A. 7, 1968); *Anchor Mfg. Co. v. N.L.R.B.,* 300 F.2d 301, 303 (C.A. 5, 1962). The "principle is not that when false statements are made they constitute interference with free choice, but that *when* false statements are made *which* constitute an interference with free choice, for or against a bargaining representative, an election should be set aside." *Anchor Mfg. Co., supra,* 300 F.2d at 303, emphasis in the original. The alleged misrepresentations here were about the Company's own plans, about which the employees had personal knowledge against which to measure the claims of each side. This is a factor which the Board and the courts have considered of the utmost importance in determining whether the employees could have been misled. *Baumritter v. N.L.R.B.,* 386 F.2d 117, 120 (C.A. 1, 1967); *Macomb Pottery Co. v. N.L.R.B.,* 376 F.2d 450, 453 (C.A. 7, 1967); *Hollywood Ceramics, Inc., supra,* 140 NLRB at 224.[13] Accordingly, where, as here, the alleged misrepresentations were made in the context of a campaign which "[gave] the

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[13] In contrast, in all the cases cited by the Company (Co. Br. 19-20), the misrepresentations made were about conditions at plants other than that at which the election was being held and about which the party making the misrepresentation was clearly expected by the employees to have superior knowledge. Cf., *N.L.R.B. v. A.G. Pollard,* 393 F.2d 239, 242 (C.A. 1, 1968).

electorate a fair opportunity to appraise the issue[s]" the election will not be set aside. *Steelworkers v. N.L.R.B., supra,* 393 F.2d at 664.

Moreover, not only were the statements themselves unobjectionable but the Company, contrary to its claim, had ample time to reply to both leaflets. The Company does not contend that it had no time to reply to the August 7 handbill, but argues instead that it could not reply to their reiteration on August 10. This contention is without merit. According to the Company's personnel manager, Vernon Lange, he received a copy of the August 10 handbill at 6:45 that morning (J.A. 43, n. 10). Since the disputed statements contained therein were about matters previously raised and related to matters directly within the Company's knowledge – pensions and insurance – the Company needed virtually no time to prepare a rebuttal to the Union's claims.[14] Here, as in *N.L.R.B. v. Houston Chronicle, supra,* 300 F.2d at 279, one day was ample to prepare a response. Contrast the situation here with those in the cases upon which the Company relies in its brief, pp. 19-20, which involved misstatements about which the opposing party would have had difficulty checking and rebutting in the day or two remaining before the election.

In sum, nothing the Union said about the Company's insurance and pension plans could have so misled the employees as to warrant setting the election aside. If the employees had any misapprehensions about these matters resulting from the Company's failure to answer in detail the Union's assertions, it is the Company's own fault, for the Company did have an adequate opportunity to respond.

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[14] Even where the Company claimed it did not have the facts – about the individual payments made to the employee for his wife's hospitalization – the Company did have the facts about how the payments would be made under the insurance plan. The Company could have attempted to contradict the Union's claims by setting forth how it would pay on a similar claim.

3. The final misrepresentation which the Company claims should have required the Board to set the election aside, was contained in the Union's handbill the morning of the election, to which the Company concededly had no chance to reply. Reproducing a page from a report the parent Company, National Presto Industries, Inc., had filed with the United States Department of Labor, the handbill showed the amounts of money paid by the parent to a labor relations consultant during the year 1966 (J.A. 35-36; 98). The Company's two principle objections are (1) that the handbill did not indicate that the money paid was in fact not all paid for work at the Jackson plant, but was for work at the Jackson plant and four others; and (2) that the handbill stated that the labor consultant "is what we call the Union Buster" and that "Presto is paying this man to keep the Union out of the Plant."

Again, we submit that the Regional Director was correct in concluding that this was permissible campaign propaganda which the employees could properly evaluate. The handbill stated that Robey was an outside labor consultant, then stated as the Union's *opinion* that he was a union buster, not as a fact supported by U.S. Government figures. And the handbill accurately told the employees that Robey had been around the Jackson plant performing services for the Company in the final week before the election. The actual figures taken from the Labor Department were accurate and did reveal that the amounts paid were paid by "National Presto Industries, Eau Claire, Wisconsin," not solely by the Jackson plant. Under these circumstances the employees were clearly aware that it was the Union's opinion, not fact, that the Company was spending substantial amounts of money to an outsider in its admitted efforts to keep the Union out of the plant.[15]

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[15] In the handbill, the Union called the employees' attention to the fact "that the above fees and expenses was for the year 1966. . . , " and "wonder[ed] how much they have paid him this year?" (J.A. 98).

The only case cited by the Company, *Halsey W. Taylor Co.*, 147 NLRB 16, 19 (1964), effectively disposes of the contention that the Union's misrepresentation – if such it be – of the amount disbursed for use at the Jackson plant was sufficiently gross to require setting aside the election. In that case, the Board found objectionable a representation to the employees that a company with earnings of $3,000,000 disbursed $2,350,807 to its stockholders, when, in fact, it had disbursed approximately 2% of that figure. Here, even assuming that substantial parts of the money spent were spent for services at other plants in 1966, the magnitude of the misrepresentation does not approach that in *Taylor.* Finally, the Union did not directly claim that the money was for services only at the Jackson plant; it claimed, accurately, that the parent corporation, with a well-publicized opposition to the Union, found it worthwhile the year before to spend the stated amount of money for labor relations services – services which the Union believed were for the object of defeating union organizing campaigns. In short, the extent of the Union's exaggeration of both the purpose of hiring the labor relations consultant and the amounts paid him was not so grossly disparate as to require setting aside the election.

B. The List of Employee Names and Addresses

The Company contends that the election was invalid because the Union was provided with a list of employee names and addresses which the Company had supplied the Regional Director pursuant to the Board's *Excelsior* rule (promulgated in *Excelsior Undrwear, Inc.*, 156 NLRB 1236 (1966)). In support of this contention, the Company now relies on *Wyman-Gordon Co. v. N.L.R.B.*, 397 F.2d 394 (C.A. 1, 1968), cert. granted, 393 U.S. 932. In *Wyman-Gordon,* the First Circuit held that

the *Excelsior* rule is unenforceable because it was not promulgated in conformity with the provisions of Section 4 of the Administrative Procedure Act (5 U.S.C. Sec. 553).[15a] Before the Board, however, the Company did not rely on this ground, but simply challenged the substantive validity of the *Excelsior* rule. Thus, Section 10(e) of the Act bars the Company from asserting here that the procedures used by the Board in adopting and promulgating that rule were improper.[16] In any event, even if the rule was improperly promulgated, and even if Section 10(e) did not bar consideration of that issue here, the Company waived its right to complain of the Board's non-compliance with the APA when it voluntarily complied with the rule and produced the list. As the First Circuit itself said in a similar situation where an employer belatedly sought to rely on *Wyman-Gordon,* "Not being alert to its rights, it missed the boat, or more exactly, boarded a boat it need not have. That is the end of it." *Magnesium Casting Co. v. Hoban,* 401 F.2d 516, 518 (C.A. 1, 1968), cert. denied, ___ U.S. ___, 70 LRRM 2344.

To the extent that the Company here attempts to renew the challenge to the *Excelsior* rule as an improper exercise of the Board's recognized discretion to control representation elections, its contention must also fail. All courts that have ruled on the validity of the *Excelsior* rule have

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[15a] All other Courts of Appeals which have ruled on this point have disagreed with the First Circuit. *Groendyke Transport v. Davis,* ___ F.2d ___ (C.A. 5, 1969), 70 LRRM 2268, 2272; *British Auto Parts v. N.L.R.B.,* F.2d ___ (C.A. 9, 1968), 70 LRRM 2065; *N.L.R.B. v. Beech-Nut Life Savers,* ___ F.2d ___ (C.A. 2, 1968) 69 LRRM 2846; *Howell Refining Co. v. N.L.R.B.,* 400 F.2d 213, 216, n. 8 (C.A. 5, 1968).

[16] Section 10(e) provides, in relevant part, that "No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."

approved it. See cases cited *supra; N.L.R.B. v. Rohlen,* 385 F.2d 52 (C.A. 7, 1967); *N.L.R.B. v. Hanes Hosiery Div., Hanes Corp.,* 384 F.2d 188 (C.A. 4, 1967), cert. denied, 390 U.S. 950 (1968). And the First Circuit strongly implied its approval of the substance of the rule. *Wyman-Gordon Co., supra,* 397 F.2d at 399. In short, as the Board demonstrated in *Excelsior, supra,* and as the court opinions cited above conclude, the *Excelsior* rule serves the valid dual purpose of giving employees a chance to hear both sides of the election campaign and of reducing the number of challenges to votes cast, thus increasing the chances for a fair election. The Company's challenge to the election on this basis should therefore be summarily rejected.

II. THE BOARD'S ORDER IS REASONABLE AND PROPER

The Board ordered the Company to cease and desist from refusing to bargain with the Union as the exclusive bargaining representative of the employees in an appropriate unit and from interfering in any like or related manner with the employees in the exercise of their Section 7 rights. Affirmatively, the Board ordered the Company to bargain with the Union upon request and to post appropriate notices (J.A. 170-171, 160-161). The Union argues that the Board's order is insufficient "to restore the *status quo ante* without the additional relief requested by the IBEW (U. Br. 10); the Company concedes that the order is proper if the unfair labor practice proceeding is proper (Co. Br. 10, 26).

The Union, while noting that the Board's aim in framing remedies is to restore the situation "as nearly as possible to that which would have obtained but for the unfair labor practices," *Phelps Dodge Corp. v. N.L.R.B.,* 313 U.S. 177 (1941), omits mention of the critical standard that the Board's order may not be disturbed "unless it can be shown that the order is a

patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Fibreboard Paper Products Corp. v. N.L.R.B.*, 379 U.S. 203, 216 (1964). Moreover, as this Court has recognized, the standard of review remains the same whether the party challenges the order on the grounds that his rights were infringed by the Board's *refusal* to order a remedy, or on the ground that the remedy is in excess of its discretionary powers.

> The Board's power to fashion remedies places a premium upon agency expertise and experience, and the broad discretion involved is for the agency and not for the court to exercise. We cannot insist that the traditional relief provided here will be so ineffective to enforce the policies of the Act as to be insufficient as a matter of law.

Amalgamated Clothing Workers v. N.L.R.B. (Hamburg Shirt), 125 U.S. App. D.C. 275, 281, 371 F.2d 740 (1966). See also, *United Steelworkers v. N.L.R.B. (Northwest Engineering)*, 126 U.S. App. D.C. 215, 218, 376 F.2d 770 (1967), cert. denied, 389 U.S. 932; *Retail, Wholesale & Dept. Store Workers Union v. N.L.R.B.*, 128 U.S. App. D.C. 41, 48, 385 F.2d 301 (1967).

Measured by these standards, the Union's argument here must fail. At no point has it demonstrated that the traditional relief here ordered – bargaining on request with the Union – will be ineffective as a matter of law. Initially, the Company's conduct here complained of is solely its refusal to bargain without first seeking court review of the Board's underlying certification in the only manner available to it under the statute. See *Retail, Wholesale Workers v. N.L.R.B., supra.* Unlike cases cited by the Union (U. Br. 16-18) where employer unfair labor practices were found to have undermined the employees' confidence in the union by flagrant violations of the Act, the Company here has violated the Act only in a

"technical" sense. In the cases cited by the Union, the additional relief ordered – *e.g.*, mailing list, access to parking lots, access to bulletin boards, reading of notices – were all based on record showings of specific unfair practices which tended to intimidate employees or prohibit communication between employees and the Union.

Thus, in *H.W. Elson Bottling Co.*, 155 NLRB 714 (1965), enf'd with modifications 379 F.2d 223 (C.A. 6, 1967), the requirement that the cease and desist notice be mailed individually to employees was predicated on a showing that employees had been individually interrogated; and the provisions in the Board's order for access to bulletin boards and a 1-hour meeting on Company property were predicated on the substantial showing of unusual interference with communication between the union and the employees. Moreover, the Sixth Circuit there deleted the requirement that the Company open its doors for a 1-hour meeting, because the unfair labor practices there found were not sufficiently flagrant to justify such a drastic invasion of the employer's property. 379 F.2d at 226-227. In contrast, the relatively minor unfair labor practices the Board found Presto committed in another case, a year prior to the refusal to bargain here – interrogating a single employee as to where he had obtained union cards, telling employees the plant could move if a union entered the plant and threatening one employee with discharge – do not necessitate a large scale remedial order to reinstate the *status quo.*

In short, we submit that this case is squarely in point with *Retail Wholesale and Dept. Store Workers v. N.L.R.B., supra,* where this Court found that the circumstances "did not serve as an appropriate vehicle for the creation of unprecedented remedies." As in that case, judicial review of the underlying representation proceedings could be obtained by the Company only through this proceeding, and no evidence has been presented which suggests that the Company sought review here only for purposes of delay.

CONCLUSION

For the foregoing reasons, the petitions to review filed by the Union and the Company should be denied, and an order should enter enforcing the Board's order in full.

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February 1969.

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,051

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, Petitioner

versus

NATIONAL LABOR RELATIONS BOARD, Respondent
PRESTO MANUFACTURING COMPANY, Intervenor

No. 22,313

PRESTO MANUFACTURING COMPANY, Petitioner

versus

NATIONAL LABOR RELATIONS BOARD, Respondent

REPLY BRIEF FOR PETITIONER IN CASE NO. 22,313

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No. 22,313

PRESTO MANUFACTURING COMPANY,
Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent.

REPLY BRIEF FOR PETITIONER IN CASE No. 22,313

STATEMENT OF THE ISSUES PRESENTED BY THIS BRIEF

Presto Manufacturing Company (herein called Presto) filed its brief in this consolidated proceeding on

December 6, 1968. On February 5, 1969, the Board filed its brief.

In its brief the Board argued the various objections presented to the Court for review individually, without considering the cumulative effect upon the employees of the various misrepresentations by the Union. It contended that the objections, viewed singly, did not have the effect of interfering with the employees' choice in the election. Nor did the Board, in its brief, consider the background circumstances within which the misrepresentations occurred so that an objective evaluation within such circumstances could be made. It made inferences of fact relating to the intention of the Union, in its representations to employees and their effect upon employees, which, in the absence of a hearing, are without record support.

SUMMARY OF ARGUMENT

The Board erred in its Regional Director's decision, as well as in the position taken in its brief, by considering each of the various objectionable acts committed by the Union in isolation and ignoring the campaign as a whole within its full contextual environment.

The Board did not afford the employer a hearing in which to develop the full facts surrounding the misrepresentations made by the Union. Therefore, no resolution of controverted fact was made. Accordingly, its factual contentions relating the motivation of the Union and its contentions as to the fact of employee response to misrepresentations are properly to be

viewed as *issues* of fact rather than *proven* fact where unsupported by the record. The Board's brief creates issues of fact which themselves demonstrate the Regional Director's error in failing to provide a hearing.

When evaluated within proper legal criteria, the objectionable conduct upon which Presto relies in seeking to set aside the election is shown to be substantial. The election was *not* held free of interference with the laboratory conditions required by Board election rules.

ARGUMENT

"It is not the effect of any one of the objectionable acts standing alone, however, but the combined effect of all of them, which must be considered." *Hometown Foods, Inc. v. NLRB*, 379 F.2d, 241, 244 (5th Cir. 1967). See also *Howell Refining Co. v. NLRB*, 400 F.2d 213, 218. Nor can the objectionable conduct, even viewed cumulatively, be evaluated in a vacuum. Each election situation is unique. Environmental factors, not themselves a part of the objectionable conduct, influence employees and contribute to the attitude with which misrepresentation will be received. In speaking to this point, the Fifth Circuit, in *NLRB v. Smith Industries, Inc.*, 403 F.2d. 889, 895 (1968), stated as follows:

> However, the problem in these representation proceedings is that we are dealing with the elusive concept of the subjective effect of objective union conduct on "the minds of the voters", and subjective as well as objective evidence may be sufficient to overturn the

> election. See Hometown Foods, Inc. v. NLRB, 5th Cir. 1967, 379 F.2d 241, 244. An evaluation of the historic facts, *without an inquiry into the surrounding circumstances,* without viewing those facts cumulatively, and without an opportunity to directly observe and examine witnesses may lead to erroneous legal conclusions. (Emphasis supplied).

It is through the commission of the errors described by the Court in the above cited cases that the election was erroneously held to be valid by the Regional Director of the Board. The same approach was utilized by the Board in its brief to this Court.

A proper evaluation of the effect of the Union's misrepresentations therefore requires consideration of all the attendant circumstances. As pointed out in the Union's brief, this was not the first election in Presto's Jackson plant involving this Union. In 1966 there had been an election in which the Union received 330 votes, an intervening labor organization had received 7 votes, and 340 employees had voted against union representation. This election was the subject of objections by the Union. Its objections were combined with a hearing on unfair labor practice charges filed by the Union. This proceeding resulted in exoneration of Presto with respect to all charges save for three instances in which lowest echelon supervisors made comments which were found to be violative of Section 8(a)(1) of the Act. *Presto Manufacturing Company,* 168 NLRB No. 144, 67 LRRM 1173. Since only two of these incidents occurred prior to the election, it is unlikely that, in a

unit of almost 700 employees, the Board could have found that they constituted grounds for setting aside the election. Such conduct, standing isolate and insubstantial, could not reasonably be interpreted to have affected the outcome of the election. *NLRB v. Blades Mfg. Co.*, 344 F.2d 998 (8th Cir., 1965); *West Texas Equipment Co.*, 142 NLRB 1393.

Before the Trial Examiner could issue his decision, however, which would vindicate the company of objectionable conduct during the election campaign, the Union withdrew its objections to the first election, and filed the petition which resulted in the election presently at issue. Presto objected to the direction of a new election without the opportunity to vindicate itself in the eyes of its employees, without the opportunity to make improvements in its employees' wages, hours and working conditions free of a pending organizational campaign without the prospect of committing an unfair labor practice.[1] (App. 45)[2] Presto's request for the opportunity to vindicate itself was denied by the Board in the prior case and the situation was not permitted as a basis for dismissal of the instant case by the Regional Director of the Board. (App. 2, 18).

Thus Presto began the new organizational campaign under a dual cloud which placed it at a disadvantage

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[1]The granting of improvements in employee benefits beyond routine wage increases would likely result in a finding that such improvements were for the purpose of and were reasonably calculated to improperly impinge on employee choice in any new election which might be ordered. *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 11 L.Ed. 2d 435, 84 S.Ct. 457.

[2]All references herein are to the Appendix of the Parties.

with its employees. It had been accused of interfering with its employees' rights, but denied the opportunity to demonstrate to its employees that it was innocent of the charges. Most importantly, it had been denied the opportunity to give benefits to its employees which it would have given and to which they were entitled. The essential ingredients which engender employee satisfaction — trust in his employer's fair treatment and adequate job benefits — were absent from the very beginning of the new election campaign. Presto could do nothing about this situation for which it was not responsible. Both aspects of Presto's dual disadvantage were repeatedly utilized by the Union in its campaign material. Thus, in seven separate leaflets, the Union taunted Presto with the fact that its wage increase in 1967 (a raise which was the result of averaging prior increases) was inadequate under the circumstances. (App. 80, 87, 88, 90, 91, 95 and 99). This tactic could not be met by Presto without facing another unfair labor practice charge alleging either the unlawful withholding of wage increases during an election campaign or the unlawful promise of one. The fourteen month delay incident to the first election and its consequent effect on employee benefits are essential aspects of the background within which the effect of misrepresentations concerning employee benefits must be evaluated. Dormant employee feelings about the inadequacy of a wage increase, brought to life and turned into resentment against the employer by the Union's repetitive propaganda, provide a ready receptacle for the receipt of representations concerning employer's denial of other benefits.

But the major injury perpetrated by the Union during the campaign was to Presto's credibility, its integrity — indeed, its honesty — in the eyes of its employees. This was a direct result of the representation by the Union that Presto was dealing with the Board behind the backs of the employees, and the Regional Director's treatment of Presto's request that he remedy the situation.

The Board attempts to minimize this situation by treating the Union's leaflet as (1) simply a response to a company leaflet, (2) as restricted only to the timing of the election, (3) and as offering sufficient time for rebuttal prior to the election.

The company leaflet was an announcement solely of the fact of a scheduled election. All Board elections are arranged with that governmental agency. Presto "claimed" nothing. Nor did it admit to any wrongdoing by "arranging" for an election while its employees were on vacation. The Union's assertion was that it proved a charge which the Union had made "time after time" of connivance between the company and the government. The accusation goes beyond any professed answer to a company statement. By its terms it states that the company leaflet admits to a *pattern* of double dealing. The Board's interpretation is not justified in the text of the handbill. There is *no reference* in the handbill to a company refusal to agree to a consent election or to the Board's extension of time to file briefs. *If* that had been the Union's intention, *if* there had been a hearing on the objections, and *if* the author had credibly so testified on examination and cross-

examination, the Board could appropriately argue that interpretation. In the absence of record evidence, the Board must be bound by the literal terms of the leaflet itself.

Whether or not a company reply to the leaflet would have been effective if it had chosen that alternative rather than appealing to the Board is not the issue. In fact, it appealed to the Board, as the other party whom the Union had stated was improperly dealing behind the backs of the employees. The Regional Director's reply destroyed any hope of an effective rebuttal to the Union's leaflet by Presto. The treatment of the company letter as a prohibited *ex parte* communication was itself an accusation of improper contact with the Board. How effective could a company reply be in these circumstances? Any effort to meet the Union's prior claim would be with the foreknowledge that the Union could *prove* that the Regional Director *agreed,* in at least one instance, with the Union's characterization of the company. *Any* effort to dissipate the effects of the Union leaflet would only exacerbate its effects.

The Acting Regional Director agreed, in his decision, with the interpretation of the Board's Rules and Regulations of the Regional Director. (App. 10). Despite requests by Presto in its Request for Review (App. 108) and in its Motion for Reconsideration (121-123), that the Board rule upon this interpretation of Section 102.126, 102.128(a), and 102.129(a), the Board refused to do so. (App. 120, 125). In its brief (p. 13), the Board takes the surprising position that subsections (a) and (b) "merely define the point in time when a

representation proceeding becomes 'on the record' and, out of considerations of fairness, *ex parte* communications are *thereafter prohibited until the case is closed.*" (Emphasis supplied). Accordingly, the Board reasons, the Regional Director's service of the letter was proper under the Board's rules and cannot serve as a basis for setting the election aside.

If this be a correct interpretation, then each and every regional office of the Board daily participates in violations of the requirements of this section. Using the present case for illustration, the entire investigation by the regional office was handled *ex parte*. Presto sent letters to the Regional Director, who of necessity participated in the initial Decision and Direction of Election and in the Supplemental Decision and Certification, the findings of which are here at issue. Evidence was furnished *ex parte* to a Board investigator who had to have participated in the Supplemental Decision or there would have been no information upon which the Supplemental Decision could be grounded. It is assumed that the Union also gave evidence or communicated its position on the objections to the Regional Director, but such communication was never served on Presto in accordance with Section 102.133.

If that be the correct construction of the proscribed *ex parte* communications sections, such fact would not prevent consideration of the Regional Director's action as contributing to the foundation of meritorious objections. His selection of but one *ex parte* communication, out of many in the case, to be treated as prohibited is beyond any discretion reposed in him by the

Rules. If he elected to waive the requirements of these Rules as to other communications, similarly prohibited, his selection of this communication as the only one for which the Rules were involved was, under the circumstances of this case, improper.

The situation in which the company then stood affords the context within which the effect of the misrepresentations concerning its pension and insurance plans can be meaningfully understood.

The Union represented that Presto had no pension plan on August 7. (App. 93). The same day Presto issued a handbill which listed "protection for your old age" as one of a number of benefits the employees enjoyed. On the day preceding the election the Union reiterated its representation that there was no such plain. In *ordinary circumstances* such representation might be evaluated by employees simply as propaganda if evaluated within proper perspective.

Here, however, the statement was by that organization which had *exposed* the company for its prior double dealing — an "exposure" to which the Regional Director has given quasi-official credence. Many employees might, and reasonably so, believe that Presto had again been exposed, this time for a claimed pension plan which it did not have. In a hearing Presto could show that its Jackson operations had not been in existence for a sufficiently long period that there would be recipients of benefits under the plan, that a substantial number of employees were hired since the initial announcement of its pension plan, and other

factors showing that the employees lacked independent information upon which to evaluate the Union's misrepresentation. Thus, they must choose between the credibility of the "guilty" employer and that of the organization which first showed them the guilt.

The Board contends that the Union's misrepresentations concerning the pension plan were for the purpose of forcing the company to disclose the terms of the pension plan to the employees. (Board's brief, p. 15). Since the Union's position and the intention of its various handbills are not in the records, the Board relies exclusively on a previous handbill. The Board apparently contends that Presto cannot complain because it did not respond to the Union's challenge:

> "Do you contend that you are going to give them an Improved Pension Plan if they vote the Union out??? IF SO, PUT IT IN WRITING." (Ex. 24, App. 88)

The Board knows that there can be no answer to such a challenge. If Presto, in writing or otherwise, promised an improvement in the pension plan conditioned upon the rejection of the union, it would violate Section 8(a)(1) of the Act. Conversely, a negative reply would insure victory for the union in the election. The only relevance which this handbill has to the issue is that it proves the Union had knowledge of the pension plan and *willfully* misrepresented that it did not exist.

The Board further claims that the Union's references to the insurance were for the purposes of seek-

ing employee investigation of the insurance plan. The Board completely miscomprehends the real nature of this misrepresentation. The Union sought to convince employees that a named employee *still owed* that which, in fact, was *the entire medical expense*. Employees could only believe, considering the union's apparently *exact* figures, that any maternity claim would equal more than three hundred dollars *after payment of the insurance amount.*

The company did not have the claim for the doctor's bill at the time the leaflet was distributed. (App. 42). If it had had the facts it could have *effectively* replied by stating the actual amounts paid. It might show to the employees — most of whom do not utilize *private* rooms and television during confinement — that a substantial part of the costs were those which most employees would not incur. Given sufficient time, the company might show that insurance plans under the Union's contracts do not provide coverage for such hospital luxuries. Without either information or time, the company was helpless to do any of these things.

The Union's ploy — invitation to employees to ask the named employee about it — was effective in casting an aura of authenticity to its misrepresentation. But it did not, as claimed by the Board, operate to permit employees to check the facts and judge for themselves. Over six hundred widely dispersed employees would have slight chance, during the course of the *one* day remaining until the election, to discuss in detail with the named employee his insurance experience.

The last assertion by the Union, apparently based on its experience as a representative of employees, in its context is that there would be a better plan if the company were paying its share of the cost of insurance. Therefore, it followed that the company was not paying its share ". . . (A) misrepresentation by one in fact having no knowledge at all would be effective if he was thought to be credible." *NLRB v. A. G. Pollard Company,* 393 F.2d 239, 242 (First Cir. 1968). So the company, dealing with the government behind the backs of its employees, claiming a pension plan it did not have, and depriving employees of an adequate pay increase, was now shown to be cheating on its payments to the insurance plan.

All of the above misrepresentations involve, directly or indirectly, the employer's refusal to give money to employees and to provide benefits which cost money. On the day of the election, the Union told the employees where that money went — to a "Union Buster".

Looking at the leaflet through eyes of a lawyer or a court, it might reasonably be argued that the leaflet does not contend that such label was affixed to Robey by the "U.S. Labor Department". But the leaflet must be evaluated through the eyes of employees. The Union, expert in this field, defined the term "outside labor consultant" as meaning "union buster". While the figures shown do not indicate that any of the funds were paid *by* the Jackson plant, this fact, contrary to the Board's contention, does not afford employees the basis for evaluating the handbill. The handbill can only be understood in terms that Presto withheld its em-

ployees' legitimate wage increases in order to give them to a "Union Buster" to keep the Union out of the Jackson plant.

Attempts by the Board to diminish the effect of these last-minute representations by the Union cannot overcome the crucial timing of these handbills by the Union nor their deliberate distortion. "One must regard deliberateness as an admission that the matter was important. No one is in a better position than the Union to know what the voters need to be told." *NLRB v. Francoa Chemical Corporation,* 303 F.2d 456, 461 (1st Cir. 1962).

CONCLUSION

For the reasons set forth above, as well as those set forth in Presto's main brief, we submit that a decree should issue denying enforcement of the Board's order.

Respectfully submitted this 5th day of March, 1969.

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CERTIFICATE

The undersigned certifies that one copy each of Reply Brief for Petitioner, Presto Manufacturing Company, has this day been served by certified air mail upon the following counsel at the addresses listed below:

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